IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

—v.—

HOLT, RINEHART & WINSTON, INC. and
JACK NEWFIELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRWIN N. WILPON
135 Willow Street
Brooklyn, New York 11201
(212) 522-1282

Counsel for Petitioner

TABLE OF CONTENTS

Citations

Cases:

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Petitioner prays that a writ of certiorari issue to the Court of Appeals of the State of New York to review a judgment of that Court entered on July 14, 1977. A motion for rehearing was denied by that Court on September 7, 1977.

Opinions Below

The majority, concurring and dissenting opinions of the Court of Appeals reversing the decision of the Appellate Division and granting summary judgment to the respondents are set forth in separate Appendix C, A5. They are reported in 42 N.Y. 2d 369.

The majority, concurring and dissenting opinions of the Appellate Division affirming the denial of summary judgment are set forth in Appendix D, A55. They are reported in 53 A.D.2d 839, 386 N.Y.S.2d 818.

The unreported opinion of the Court of first instance denying summary judgment is set forth in Appendix E, A66.

Jurisdiction

The final judgment of the Court of Appeals of the State of New York, the highest state court, was entered on July 14, 1977 (Appendix A, A1). A timely motion for a rehearing was denied by that Court on September 7, 1977 (Appendix B, A3).

The judgment of the Court of Appeals dismissing the libel action of the petitioner is based on the respondents' free press rights under the First Amendment to the Federal Constitution. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). (*Zacchini* v. *Scripps Howard Broadcasting Co.*, —— U.S. —— 53 L. Ed.2d 965 (1977).

Constitutional Provisions Involved

United States Constitution, Amendment I

"Congress shall make no law . . . abridging the freedom of speech or of the press."

United States Constitution, Amendment XIV, Section 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Did the petitioner, a public official, meet the burden imposed on him by the decisions of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny of showing falsity and malice on the part of the respondents sufficient to defeat their motions for summary judgment?

2. Where the published charge that petitioner is "probably corrupt" is admitted by respondents to be based totally on an indictment of petitioner for perjury and petitioner has shown the falsity of such charge, did the Court below correctly interpret the decisions of this Court in *New York Times* v. *Sullivan, supra,* and its progeny as requiring it to hold that the petitioner nevertheless has the burden of proving as a general negative that he is not "probably corrupt?"

3. Where the published charge of "suspiciously lenient sentences" is admitted by respondents to be based on four specific cases and petitioner has shown by the Court records in those four cases that the charge based thereon is false, did the Court below correctly interpret the decisions of this Court in *New York Times* v. *Sullivan, supra,* and its progeny, as requiring it to hold that the petitioner nevertheless has the burden of proving as a general negative that "no sentences were unduly lenient?"

4. Where the respondents admittedly based their charge that petitioner was "suspiciously and inexplicably lenient to heroin dealers and organized crime figures" and "is putting people (Glover) on the street who sell death for a profit" on four specific cases and respondents knew from the Court records in those four cases and knowingly and purposefully omitted from their publication that the dis-

positions by petitioner in each of those four cases was upon the consent and recommendation of the district attorney and that Glover was in jail for five years and was not put on the street, did the Court below correctly interpret the decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), as requiring it to hold that the choice of material to go into the book was an exercise of editorial judgment on the part of the respondents and thus that the knowing omissions did not evidence malice on the part of the respondents?

5. Was it a reckless disregard for truth or falsity for respondents in their publication to charge that petitioner is "very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing" and that "every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia. The Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" and on their motions for summary judgment to have offered nothing to support such charges, thus indicating that such charges were made without supporting basis?

6. Was it malice on the part of the respondents to have put a heading in large type "Justice Gets A Fix" on one of the articles about petitioner republished in their book, thus creating the anticipation and impression in the minds of its readers that it would show venality or corruption on the part of the petitioner in his dispositions of the cases discussed therein, when in fact there was no claim of venality or corruption anywhere in the text of the article, and the author admitted on pre-trial disclosure that nowhere in the article did he charge venality or corruption and that he had no evidence of corruption?

Statement

The petitioner is a justice of the Supreme Court of the State of New York. The respondent Jack Newfield (Newfield) is an editor of a weekly newspaper called the Village Voice (Voice). Newfield wrote four defamatory articles in Voice about the petitioner in the issues of August 31, 1972 (Appendix H, A120), October 12, 1972 (Appendix H, A127), November 9, 1972 (Appendix H, A130) and November 30, 1972 (Appendix H, A132), and an article in New York Magazine of October 16, 1972 (Appendix H, A134).

Petitioner did not commence any action on these articles for the very pragmatic reason that under the constraint imposed by *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), he then was not possessed of proof which would probably sustain a finding of malice in the publication of the false articles.

After the first four of those articles were published, the Brooklyn Bar Association made an investigation of the cases on which Newfield based his charges against the petitioner in those articles and found the charges to be false and unfounded (Appendix Y, A195). By letters dated November 28, 1972 (Appendices S, T, A182, 183) the Brooklyn Bar Association advised Voice and New York Magazine of the "results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases totally incorrect."

The Association of the Bar of the City of New York also made an investigation of the charges made by Newfield against petitioner in the New York Magazine article of October 16, 1972 that "his judicial temper softens remarkably before heroin dealers and organized crime figures," which allegations were stated to be based on the disposi-

tions by petitioner in three named cases, *People* v. *Burton*, *People* v. *Glover* and *People* v. *Vario* (Appendix H, A134). The Association of the Bar Committee obtained transcripts of the court minutes in those three cases. It then, on December 28, 1972, interviewed Newfield about those three cases (Appendix X, A190, Appendix DD, A251). Its Report, based on the facts in those three cases, which it set forth, and the interview with Newfield, concluded that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

On October 12, 1972, a Legal Aid Attorney named Joseph Vincent Morello wrote a letter to New York Magazine advising it that the court records in the *Burton* case show that Newfield's statements about that case, more elaborately stated in Newfield's Voice article of August 31, 1972 were erroneous in the respects pointed out in his letter (Appendix U, A184). Newfield admitted that New York Magazine forwarded Mr. Morellos' letter to him (Appendix CC, A232).

Thereafter, on February 25, 1973, Voice published an advertisement in the New York Times (Appendix H, A118) in which it referred to the articles by Newfield and republished some of the charges made in those articles against the petitioner.

Petitioner then commenced an action against Voice and its advertising agency on the advertisement (Appendix H, A114). In that action, petitioner claimed that the false commercial advertisement did not have First Amendment protection and that, in any event, the republication therein of the charges in the articles after receipt of the letters from the Brooklyn Bar Association and Mr. Morello and Newfield's interview by the Association of the Bar on December 28, 1972 was sufficient proof of malice to deny to the

republication any First Amendment protection. The complaint in that action alleged that the statements in the original articles, on which the advertisement was based, were false and attached and made the articles a part of the complaint (Appendix H, A115).

The defendants in that action moved for summary judgment which was denied (*Rinaldi* v. *Village Voice Inc.*, 79 Misc. 2d 57, affirmed 47 A.D. 2d 180, 182) (1975). The Appellate Division held that the receipt by Voice of the letter from the Brooklyn Bar Association prior to the republication was a showing of malice sufficient to preclude summary judgment. Leave to appeal to the Court of Appeals was denied by the Appellate Division. A petition for certiorari to the Appellate Division was denied by this Court (423 U.S. 883). Voice in its petition for certiorari urged that the petitioner's proof of malice was insufficient and that no further proceedings in the State court should ensue and that the judgment was thus final for purpose of review by this Court. Petitioner in his opposing brief argued that the sufficient showing of malice requiring a trial, as held by the Appellate Division, rendered the judgment not final. This Court denied certiorari for want of a final judgment.

In August 1972, when Newfield's articles in Voice and New York Magazine were beginning to be published, Newfield and Marian Wood (Wood), an editor for respondent Holt, Rinehart and Winston (Holt) agreed that the August 31, 1972 and the subsequent articles about petitioner would be republished in a book entitled "Cruel and Unusual Justice" (Appendix DD, A244; Appendix EE, A263). Wood read each of the articles as it appeared in Voice and New York Magazine (Appendix EE, A262).

The book "Cruel and Unusual Justice" was in preparation by Holt over a period of almost two years until its publication on April 15, 1974. During that time Wood and

Newfield were in continual consultation (Appendix FF, A263). In December 1972, Newfield told Wood that he had been interviewed by the Association of the Bar about his New York Magazine article of October 16, 1972 about the petitioner (Appendix EE, A268). Wood knew of rumors that the Association of the Bar had issued its report of that investigation (Appendix EE, A267). Wood read the New York Times article of September 25, 1972 by Nicholas Gage (Appendix EE, A262) in which he reported that in the *Agro* case, the assistant district attorney had stated that Agro was the "least culpable and had no prior record" and that the pleas "in each instance are recommended and the sentence will in all respects be adequate" (Appendix H, A138).

Petitioner's action against Voice was commenced in May 1973. On May 16, 1973 the New York Times published a story about the commencement of that action in which it stated that the "Village Voice articles on which the advertisement was based asserted that Justice Rinaldi had a reputation for going soft on pushers especially when they are represented by certain well-connected bail bondsmen and lawyers. The Voice also said that the judge's judicial temper softens before big heroin dealers and organized crime figures" (Appendix HH, A280). Newfield in May 1973 gave Wood a copy of the Times article about the commencement of petitioner's prior suit which alleged the falsity of the original articles (Appendix DD, A245, 246), and told Wood that she could get in touch with Voice's lawyer, Victor A. Kovner, for any information she wished about the suit (Appendix DD, A246).

Prior to November 1973, Newfield obtained a copy of the Brooklyn Bar Report (Appendiv DD, A249, 250) and wrote a postscript about it for the book, which he then gave to Wood. Wood thus knew, in November 1973, of the Brook-

lyn Bar Report, in her words, "clearing Rinaldi" and inserted in the postscript about it in the book (page 108) a statement of the conclusion in the Report that Newfield's articles were false (Appendix Y, A205). Wood read the New York Times article of April 9, 1974 reporting the conclusion in the Association of the Bar Report that "Newfield failed to substantiate his charges against Justice Rinaldi" (Appendix FF, A273) and she admitted in pre-trial disclosure that Newfield had also then told her that that Report had stated "that he had 'not substantiated' his opinions regarding Justice Rinaldi's alleged incompetence and bias" (Appendix FF, A274). The respondents for months thereafter continued to distribute and promote the book by appearances by Newfield, arranged by Holt, on television and radio (Appendix II, A281-289).

On May 30, 1973, while the book was in preparation for publication, the petitioner was examined in pre-trial disclosure in his prior action against Voice (Appendix BB, A213). During the course of such examination petitioner testified as to the falsity of the articles and petitioner therein produced for inspection by Voice the court minutes in the cases of *Burton, Glover, Vario* and *Agro,* and was examined by Voice's counsel with respect thereto. Petitioner also produced upon such examination the letters from Joseph Vincent Morello (Appendix U, A184) and Leonard D. Wexler (Appendix V, A185). Newfield was also examined in pre-trial disclosure in that action in June and October 1973 while the book was in preparation with respect to the contents of the court minutes in those four cases on which he had based his charges (Appendix CC, A231). On such examination he admitted that if he knew when he wrote the article about *People* v. *Burton* that the district attorney had recommended and consented to Burton's parole on the charge, "if I knew it and withheld that

information it would have been unfair" (Appendix CC, A234).

The petitioner in August 1974 commenced this action based on the defamatory matter in the book concerning him republished from the original articles, with some subsequent additions thereto, which is set forth in paragraph "Twelfth" of the petitioner's complaint (Appendix F, A95).

In its answer and amended answer in this action the respondent Holt admits that during the period from April 1973 through April 1974, it had "knowledge" of petitioner's prior action against Voice and of "plaintiff's sworn testimony in that action" in "reliance" upon which it published the book and based on this, claimed an equitable estoppel against petitioner because he had not sued on the original articles (Appendix G, A110-111).

The respondents moved for summary judgment in this action which was denied at Special Term (Appendix E, A66). The Appellate Division affirmed (Appendix D, A55). The Court of Appeals, on July 14, 1977, reversed and granted summary judgment dismissing the complaint (Appendix A, A1; Appendix C, A5). Petitioner's timely motion in the Court of Appeals for reargument was denied on September 7, 1977 (Appendix B, A3).

The petitioner had joined Voice as a defendant in this action on the ground that it, as copyright owner of the original articles, had given consent to Newfield and Holt to republish them. Special Term dismissed as to Voice (Appendix E, A90-91) and the Appellate Division affirmed (Appendix D, A55). The petitioner did not seek further review of such dismissal as to Voice and that defendant is out of the case.

Although at the time they republished the articles in the book, the respondents were aware that in the four cases, *Burton, Glover, Vario* and *Agro,* the district attorney had consented to and recommended the dispositions, the respondents nevertheless republished the charges in the articles based on those four cases as originally written, that in these dispositions petitioner "had acted suspiciously and in ways that defied law and reason," knowingly and purposefully omitting to state that in each case the district attorney had consented and acquiesced in the disposition. They also added to the charge in the article of August 31, 1972 "So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit" (Appendix H, A125) by including in the book the sentence "Glover, remember, was not an addict but a businessman," (Appendix FF, A276) though they then knew from the court minutes in *Glover* that Glover was in jail for five years (Appendix L, A155).

Among the charges made in the book is that the petitioner is "probably corrupt" (Appendix F, A100) and that his sentences of heroin dealers and organized crime figures were "suspiciously lenient" (Appendix F, A98). The Court of Appeals agreed that these charges were libelous per se (Appendix C, A20) and that "accusations of criminal activity, even in the form of opinion, are not constitutionally protected" (Appendix C, A27), but held that petitioner had not established their falsity (Appendix C, A28).

Newfield testified in pre-trial disclosure that the charge of "probably corrupt" was "based totally on the fact that he (petitioner) had been indicted" and that he otherwise had no evidence of corruption (Appendix DD, A257).

The indictment of petitioner, subsequently dismissed, was for perjury. Even while the indictment existed, it had no probative force and was enveloped in a presumption of

innocence. It thus could not validly support any charge of probable guilt and the charge of "probably corrupt" based thereon was necessarily false.

The Court of Appeals under what it deemed to be the compulsion of *New York Times* v. *Sullivan, supra*, 376 U.S. 254 and its progeny went beyond this, nevertheless, and held that "it is the plaintiff's burden to establish that he is not 'probably corrupt'" (Appendix C, A28).

As to the charge that "his sentences of certain defendants were "suspiciously lenient" which respondent Newfield admitted on pre-trial disclosure was based on the four cases, *Burton, Glover, Vario* and *Agro* (Appendix CC, A242), the petitioner showed by the court records in each of these cases that these four dispositions were made on the consent and recommendation of the district attorney and that they were not "suspicious" dispositions. The Court of Appeals, nevertheless, again under what it deemed the compulsion of *New York Times* v. *Sullivan, supra,* and its progeny, held that the petitioner has the burden or proving that "no sentences were unduly lenient" (Appendix C, A28).

The Court of Appeals thus placed upon the petitioner the burden of proving the general negative that he is not "probably corrupt" and that "no sentences were unduly lenient," a burden which the concurring opinion of Chief Judge Breitel and Judge Wachtler admitted was "virtually impossible" to meet (Appendix C, A38). The dissenting opinion of Gabrielli, J., stated that the result "is to summarily foreclose the possibility of ever bringing a libel action to the trial stage" (Appendix C, A50).

Reasons for Granting the Writ

The New York Court of Appeals has incorrectly interpreted and applied the decisions of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 and its progeny and has placed upon a public official plaintiff in a libel action an undue burden of proof which is greater than and not in accord with that laid down by this Court. The Court below has also incorrectly interpreted and applied the decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo* 418 U.S. 241 (1974), in holding that the knowing omission by a publisher of crucial facts showing the falsity of the publication, was a permissible exercise of editorial judgment as to what to publish and thus not evidence of malice. The effect of the decision below is to effectively bar any libel suits by public officials and, as to them, to render the First Amendment privilege of the press virtually absolute.

Since in a libel action by a public official this Court reviews the evidence to make certain that constitutional principles have been correctly applied (*New York Times* v. *Sullivan, supra*), 376 U.S. at p. 285), petitioner deems it necessary to discuss the evidence in detail showing falsity and malice on the part of the respondents.

I.

The holding of the Court of Appeals that petitioner had not met his burden of proof as to the falsity of the publication was erroneous.

Respondent Newfield wrote in the book that petitioner's "judicial temper softens before heroin dealers and organized crime figures" (Appendix F, A95). "During the fall of 1972, I wrote three more articles detailing suspiciously lenient decisions by Justice Rinaldi. Two of these cases

involved Mafia members Paul Vario and Sal Agro, and a third involved a narcotics dealer named Clifton Glover" (Appendix F, A98). "I wrote four articles in the Voice and one in New York Magazine detailing cases in which Judge Rinaldi had acted suspiciously and in ways that defied law and reason" (Appendix F, A100). "What Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit (Glover, remember, was not an addict, but a businessman)" (Appendix F, A98).

The cases which Newfield referred to as having "detailed" were *People* v. *Burton, People* v. *Glover, People* v. *Vario* and *People* v. *Agro.* In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* Newfield testified that his charge that petitioner was suspiciously lenient to heroin dealers and organized crime figures "was based on my previous writing about the *Burton, Glover, Vario* and *Agro* cases primarily" (Appendix CC, A242) and that when he wrote such statement he had no other specific cases in mind (Appendix CC, A242-243).

Whether such charge of "suspicious leniency," based on those four cases, is true or false is best and conclusively determined from the Court records in those cases. The petitioner on his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* and in this action, produced the court minutes in those four cases.

The court minutes in *People* v. *Burton* (Appendix J, A141) show that Burton had been released by another judge on bail of $3000 on a drug charge. When he was arraigned before petitioner on a related bribery charge, the assistant district attorney stated that "in view of the fact that he is on bail on two other charges and this bribery charge emanates from those two others, we will have him

available, I would recommend parole."* Petitioner, accordingly, paroled the defendant on the bribery charge. There is, thus, no basis for the charge that this was "suspicious." All that was before petitioner was a routine bail arraignment, not the disposition of the indictment, on which he accepted the recommendation of the district attorney as to bail.

In *People* v. *Glover,* the court minutes (Appendix L, A149) show that Glover had just received a five year federal sentence on a robbery conviction and that petitioner postponed Glover's case until the time to appeal from the federal sentence had expired. Then, with the acquiescence of the district attorney, to dispose of the case, he accepted a guilty felony plea from Glover with no imposition of any additional time in jail, since Glover would be in federal jail for the next five years. Petitioner imposed the sentence on Glover of a conditional discharge and Glover was then taken from the courtroom in the custody of federal marshals to serve that five year sentence (Appendix L, A155, Appendix DD, A252). The assistant district attorney acquiesced in the sentence (Appendix M, A159).

Under New York Penal Law Section 65.05, a conditional discharge was not permissible in a narcotics case. The reason for this is stated in the Commentary under McKinney's Statutes, Penal Law, Section 65.05, as follows:

> "The sentence of conditional discharge provides the court with an appropriate disposition where it wishes to impose specific obligations upon the offender but where probation supervision is unnecessary or inappropriate.
>
> • • •

* The assistant district attorney stated in an affidavit that this was his practice as to bail in related cases (Appendix K, A148).

> The sentence of conditional discharge cannot be used . . . as a sentence for any felony dealing with narcotics. In these cases the sentence must be either probation or imprisonment.
>
> • • •
>
> The purpose of the aforesaid restrictions is to assure some sort of supervision of persons who commit such crimes irrespective of the circumstances involved."

The restriction against conditional discharge, requiring supervision of the defendant, did not envision the unusual circumstances in *Glover*. A sentence of probation for purpose of supervision, which petitioner had discretion to impose, was inappropriate, as petitioner stated (Appendix L, A155-156), because Glover would be under supervision in a federal jail. Petitioner could have given Glover a sentence concurrent with the federal sentence, but under the circumstances, a conditional discharge, though not permissible in a narcotics case, was the most practical one. The district attorney evidently agreed. An article in the New York Times dated November 15, 1973, reported that the State Select Committee on Crime was investigating 247 unauthorized conditional discharges imposed by a number of Supreme Court justices, one of which was stated to be the *Glover* sentence by petitioner. The article states that "Eugene Gold, the District Attorney of Brooklyn, said through a spokesman that in every instance where we become aware of an illegal sentence, we move to correct it." He never moved to correct the *Glover* sentence. The nub of respondents' charge that, by his sentence of Glover, petitioner was putting him on the street to sell death for a profit was shown to be false. There is thus no basis for respondents' charge that petitioner's sentence of Glover was "suspiciously lenient."

In *People* v. *Vario,* the court minutes (Appendix N, A160) show that the case involving Salvatore Vario, James Marinacci and Benjamin Greenfeder came on before petitioner four years after a conviction on a prior three months' trial before another judge had been reversed because of illegal wiretaps which were suppressed by the Appellate Division. The district attorney stated on the record that because of the suppressed evidence and the fact that the case was four years old, he had grave doubt that he could get a conviction and for this reason he recommended the acceptance of a misdemeanor plea from the defendants (Appdendix N, A161-162). Petitioner then accepted such pleas. Salvatore Vario, who had spent over a year in jail pending appeal, received a suspended sentence. Greenfeder and Marinacci were sentenced to a fine of $500 or six months in jail. As to Paul Vario, he was not in the indictment with the others. He was indicted for attempting to bribe an investigator to obtain his brother Salvatore's release on bail, pending appeal, which was a legal impossibility because Salvatore was prohibited appeal bail by statute since he had a previous felony conviction (Appendix O, A169; New York Code of Criminal Procedure Sections 552, 555 (in effect in 1967); *People* v. *Stolzenberg* (N.Y.) 40 Misc.2d 177 (1963)). As to Paul Vario, the district attorney stated that his case also depended on suppressed wiretaps, (Appendix N, A164) and he recommended a misdemeanor plea as to him also on which he was sentenced to a fine of $250 or three months in jail. In view of the district attorney's recommendation of a misdemeanor plea because of the weakness of his case, the record does not support respondents' charge that the misdemeanor plea and sentence was "suspiciously lenient," and that "Judge Rinaldi caused a local scandal when he permitted three prominent organized crime figures charged with bribery and conspiracy to plead guilty to

misdemeanors and let them go free with only $250 fines" (Appendix F, A95-96).

In *People* v. *Agro,* the court minutes (Appendix P, A172) show there was a large number of defendants, who, except for Agro, wished to plead guilty. Agro insisted he was innocent and would not plead. The district attorney did not wish to try the case only as to Agro (Appendix BB, A226). He stated that Agro was the least culpable and had no prior record and that if Agro would plead to a misdemeanor, he, the district attorney, would recommend a suspended sentence (Appendix R, A180, 181). Agro agreed to take the plea if the judge would promise him the suspended sentence. On the district attorney's recommendation, the petitioner made the promise and later on sentence date kept it as he was then required to do under *Santobello* v. *New York,* 404 U.S. 257, 262 (1971). Since the plea and sentence were as recommended by the district attorney, the *Agro* case in no way supports respondents' charge of "suspicious leniency."

The Brooklyn Bar Association made an examination of the court records in these cases on which Newfield based his charge of "suspicious leniency to heroin dealers and organized crime figures" and made in a Report of such investigation (Appendix Y, A195) its conclusion that the magazine and newspaper articles are "untrue, misleading, inaccurate, a misrepresentation and contrary to the true facts" (Appendix Y, A198).

The Association of the Bar of the City of New York also investigated and obtained copies of the court minutes in these cases (Appendix X, A192) and interviewed Newfield about them (Appendix X, A190, Appendix DD, A251). It concluded in its Report that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

The petitioner thus made a clear and convincing showing that the charge of "suspicious leniency" admitted by respondents to be based on these four specific cases was false. The Court below held nevertheless, under what it deemed the compulsion of *New York Times* v. *Sullivan,* and its progeny that petitioner must establish the impossible negative that "no sentences were suspiciously lenient." To establish this, the petitioner would have to resurrect all of the dispositions made over many years on the bench and then litigate with the respondents the facts in each case to show that each disposition was not "suspicious." If he should, perchance, omit any case, the respondents would claim it was an intentional omission in order to conceal it. Aside from the fact that this would prolong this libel case for years, the practical impossibility of it is apparent. It is, in any event, irrelevant to this case where the respondents admittedly based their charge on petitioner's dispositions in the four specific cases and this is all the petitioner should be required to establish as false.

The charge that petitioner is "probably corrupt" was not in the orginal articles but was added in the book after the petitioner was indicted for perjury on November 12, 1973. With respect to the original articles Newfield had testified on pre-trial disclosure in the prior case of *Rinaldi* v. *Voice* that "In none of those cases do I allege corruption or venality", "I have no evidence of corruption" (Appendix CC, A241). In his pr-trial disclosure in this case he testified that his charge of "probably corrupt" was "based totally" on the indictment and that he otherwise had no evidence of corruption (Appendix DD, A257).

The petitioner had been indicted on three counts of perjury and one count of obstruction of justice which is based on the three alleged perjuries (Appendix JJ, A290). The first two counts in the indictment were dismissed on

motion (*People* v. *Rinaldi,* 44 A.D. 2d 745 affd. 34 N.Y. 2d 843) (1974). As to the third and fourth counts, the trial judge (Murtagh) made a statement on the record in the absence of the jury, press and public, that there was no case and that he should dismiss it, but that since a judge was involved, he thought there should be a jury verdict but that "in the unlikely event" there should be a guilty verdict, he would set it aside. The jury acquitted.

An indictment is no longer in existence after acquittal or dismissal (*People* v. *Louis J.* dissenting opinion 51 A.D. 2d 1, 15 on which reversed in 40 N.Y. 2d 990, 992 (1976) cert. den. —— U.S. —— 52 L. Ed. 2d 397).

Even when the indictment existed it was of no probative force (*People* v. *Cook,* 37 N.Y. 2d 591, 596 (1975). An indicted defendant is presumed to be innocent and the trial court must so charge the jury (New York Criminal Procedure Law Section 300.10). Therefore, a charge in an indictment cannot in any way be said to be true from the fact of the indictment itself.

The grand jury indicted petitioner for perjury, not corruption. The preamble to the indictment alleges that the grand jury was investigating in *People* v. *Gomes,* whether petitioner had been criminally influenced to impose a lenient sentence and in *People* v. *McCauley* whether the petitioner had been part of a scheme to unlawfully reduce McCauley's sentence on the basis of a forged document submitted to the Court (Appendix JJ, A290, 295). But this is purely rhetoric by a special prosecutor, Maurice Nadjari, since thoroughly discredited (See, for example, *Matter of Nigrone,* 46 A.D. 2d 343 (1974); *People* v. *Rao,* 53 A.D. 2d 904 (1976). In the *Gomes* case, the minutes showed that in accepting the guilty plea, petitioner told the defendants that in sentencing, he would be guided by the probation report. The probation report recommended probation and no jail sentence. Petitioner told the defendants that although he had said he would be guided by the probation report, he was surprised by it and would not follow it. He sentenced the defendants to jail terms. Nadjari suppressed the *Gomes* minutes before the grand jury.

In the *McCauley* case, the minutes showed that upon McCauley's claim that he was wrongfully sentenced as a third felony offender, he submitted a federal certificate which showed him to be a second felony offender. The district attorney stated that he did not have his copy, it was missing, of the certificate submitted when McCauley was originally sentenced which showed McCauley to be a third felony offender. Petitioner told the assistant district attorney to go over, during recess, to the Federal Court nearby, to check it out. He came back and told petitioner that McCauley's certificate was correct and petitioner resentenced McCauley as a second felony offender. The certificate later turned out, after McCauley's death in jail, to be a forgery. The *McCauley* minutes were likewise suppressed by Nadjari before the grand jury.

The petitioner waived immunity and testified before the grand jury. He also answered a detailed financial questionnaire and gave the special prosecutor and the grand jury all the bank and financial records of himself and his wife for the past three years. The special prosecutor did not ask petitioner a single question before the grand jury whether he was bribed or corruptly influenced in either the *Gomes* or *McCauley* case or of any alleged contact with the defendants in those cases or their attorneys or anyone else on their behalf as to any illicit influence or bribery. Instead, the special prosecutor confined himself to questions of the petitioner which he thought might lay the basis for the perjury charges.

In *People* v. *Brust* (New York Law Journal December 2, 1976 (pages 12-13) Sandler, J. in dismissing an indictment against a judge for perjury, which was presented to the grand jury by the same assistant special prosecutor as in the *Rinaldi* case,* stated:

> "Nor can one realistically exclude the possibility that the prosecutor was encouraged to form the opinion that the defendant was lying by his awareness that the underlying facts could not support an indictment for bribery.
>
> "Having formed that conclusion he diverted the questioning from efforts to learn the truth of the matters under investigation into a careful systematic effort to develop and preserve perjury counts.
>
> • • •
>
> "I can think of no reason for not asking that question other than the obvious one, reflected throughout the examination, that the prosecutor was interested in a perjury indictment, not in developing accurate information."

The Court of Appeals agreed that the charges made by the respondents in this case are libelous per se (Appendix C, A20) and that they are charges of "illegal and unethical actions: and that "accusations against a judge of criminal activity, even in the form of opinion are not constitutionally

* In the *Rinaldi* case Nadjari himself appeared before the grand jury, recalling the two witnesses as to the *McCauley* case who had on his assistant's interrogation not testified sufficiently to show perjury and pressured them on their testimony by leading questions. Nadjari had in his possession the *McCauley* minutes suppressed by him before the grand jury which showed a direct contradiction between one witness' statement in that case and his testimony before the grand jury. Nadjari did not ask any questions of the witness before the grand jury as to his patent perjury. This apparently was the pressure applied to the witness before recalling him before the grand jury.

protected" (Appendix C, A27). Yet, although the respondents admitted that the charge of "suspiciously lenient" was based on petitioner's dispositions in four specific cases and the petitioner had demonstrated the falsity of such charge by the strongest possible proof, the court records in those four cases, and although the respondents admit that the charge of "probably corrupt" is "based totally" on the indictment and though a charge that an indicted person is "probably guilty," from the fact of the indictment, is false, the Court of Appeals nevertheless held that it is petitioner's burden to establish the general negative that he is not "probably corrupt" and that "no sentences were unduly lenient" (Appendix C, A28).

The Court of Appeals stated that the acquittal on the indictment "involved dispositions other than the ones in issue in this case" and that Newfield's overall accusations have not been rebutted by anything more than a general denial of wrongdoing. Hence there are no evidentiary facts which would support plaintiff's claim that Newfield's accusations are false" (Appendix C, A28, 29). This holding is made in the face of respondents' admission that their charge of "probably corrupt" was based solely on the indictment involving those "other dispositions" and that the dispositions "in issue in this case" were in the four specific cases on which the respondents based their charge of "suspicious leniency" which charge was established by petitioner, from the court records in those four cases, to be false.

What the Court of Appeals is requiring of a public official in a libel case is that he must bear the impossible burden of establishing the general negative of a charge of criminal misconduct. The Court of Appeals construes this Court's decisions in *New York Times* v. *Sullivan* and its progeny to so require. If the Court of Appeals' interpreta-

tion and application of this Court's decisions is correct, then the press has a virtually absolute immunity against libel actions by public officials.

Though the Court below agrees (Appendix C, A20) that the charge of criminality is libelous *per se* (*Paul* v. *Davis*, 424 U.S. 693, 697 (1976); *Thomas H. Maloney & Sons, Inc.* v. *E.W. Scripps Company* (1974) 43 Ohio App. 2d 105, 334 N.E. 2d 494, 499 (1974) cert. den. 423 U.S. 883; *Goldwater* v. *Ginzburg* (2 Cir.) 414 F. 2d 324 (1969) cert. den. 396 U.S. 1049; *Davis* v. *Schuchat* (D.C. Cir.) 510 F. 2d 731, 737, 738 (1975); *Afro American Pub. Co.* v. *Jaffe* (D.C. Cir.) 366 F. 2d 649, 655 (1965); *Phoenix Newspapers Inc.* v. *Church* 24 Ariz. App. 287, 537 P. 2d 1345 (1975) cert. den. 425 U.S. 908), and that "no First Amendment protection enfolds false charges of criminal behavior" (Appendix C, A28), (*Gregory* v. *McDonnell Douglas Co.* 131 Cal. Rep. 64, 552 P. 2d 425, 430) (1976), the Court of Appeals, nevertheless, holds that the publisher is not required to offer any basis for his libelous *per se* criminal charges, but that the public official must prove the negative of their falsity. (Cf. *Time Inc.* v. *Firestone*, 424 U.S. 448, 459 (1976) where the burden of proof as to the correctness of its interpretation of a court record was put on the publisher.)

Under the decision of the Court of Appeals in this case, a newspaper, without any support therefor, could freely publish of a public office holder that he is a sex pervert or a rapist. The burden, impossible of being met, is then on the public official, in a libel action, to establish, beyond a general denial which the Court of Appeals holds to be insufficient (Appendix C, A28-29), that he, in his lifetime, committed no acts of sex perversion or rape. The publisher, being not required to show any support for the defamation, is then entitled to a dismissal of the com-

plaint on the basis of plaintiff's obvious inability to prove a negative. The result is deemed by the Court of Appeals to be compelled by the decisions of this Court in *New York Times* v. *Sullivan* and its progeny. Such interpretation and application of this Court's decisions is plainly wrong.

Heretofore, when a person has been indicted, no newspaper has dared to go so far as to publish that he is probably guilty. The decision of the Court of Appeals in this case now permits the press to so publish with impunity and we can be sure that, freed from past restraints, the news media will now do so with relish and abandon. The result will be that few indicted defendants will be able to get a fair trial.

II.

The holding of the Court of Appeals that petitioner had not shown clear and convincing evidence of malice on the part of the respondents sufficient to defeat summary judgment was erroneous.

A.

In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice*, the respondent Newfield testified that prior to his writing the original articles in 1972, the *Glover* sentence had been mentioned at a hearing by the Joint Legislative Committee on Crime (Appendix CC, A239) and that he had read a Daily News article and editorial (Appendices Z and AA, A207, 211) which mentioned petitioner's name, and nothing more, but which was based on the mention of the *Glover* case by the Committee (Appendix CC, A239). Newfield's information, prior to writing the original articles as to the *Burton* bail hearing, came from the police officer (Appendix F, A99, Appendix H, A121). His information

as to the *Vario* and *Agro* cases came from the Gage article in the New York Times of September 25, 1972 (Appendix CC, A235). (In that article Gage had stated that in *Agro*, the plea and sentence were on the recommendation of the district attorney (Appendix H, A138-139). Thus, Newfield even then became aware of this (Appendix CC, A236) but omitted it from the article and from its republication in the book (Appendix CC, A237-238).

Newfield wrote in the book that when Patrolman David in 1972 told him of the *Burton* case (Appendix DD, A254), "I spent the next several weeks carefully analyzing records of Judge Rinaldi's previous dispositions." He then continued by stating what this "careful analysis" purported to disclose (Appendix F, A99). On pre-trial disclosure this alleged "careful analysis of records of petitioner's previous dispositions" was exposed as a fraud. There was no such several weeks analysis and he did not check the court file in a single case (Appendix DD, A254, 257). But since this statement in the book concludes with the statement that, as a result of such analysis, "I wrote four articles in the Voice and one in New York Magazine detailing cases in which Judge Rinaldi had acted suspiciously and in ways that defied law and and reason," (Appendix F, A100) it is clear that this purported "analysis of the records" preceded the writing of the original articles about *Burton, Glover, Vario* and *Agro* and referred to those cases and he did not write about any other cases after that.

In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* Newfield testified that his charges against petitioner in the original articles were also based on interviews with lawyers and law enforcement agencies. But he refused to divulge their names, based on New York Civil Rights Law Section 79h, which provides that "no professional journalist . . . employed or associated with any newspaper

. . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication . . ." A motion was made to preclude the defendant Voice in that action from offering evidence on the trial as to such undisclosed sources. The Court, on that motion, held that Newfield should disclose such sources if the defendant intended to offer them on the trial. On re-examination, pursuant to such direction, Newfield testified that two of his sources were Assistant District Attorney Charles J. Hynes and Jerome McKenna, Counsel to the Joint Legislative Committee on Crime. When asked if Hynes had given him any specific cases, Newfield said Hynes had not (Appendix DD, A257). When asked what McKenna had told him about any cases which he said were in the Committee file, Newfield answered "I don't remember" (Appendix DD, A258). As to the other claimed sources, Newfield persisted in his refusal to divulge. An order was then made by the Court precluding the defendant from introducing any evidence or using any witnesses in any way relating to the refused to disclose sources. In this action, after similar refusal to testify as to such sources for the original articles, a similar order of preclusion was made.

The claim of alleged sources is one of defense on the issue of malice. Petitioner, in his pre-trial disclosure, sought to discover information as to any such possible defense in his preparation for trial. Petitioner was not required to and had no intention, in his affirmative case, of introducing any evidence as to any of Newfield's claimed sources, but only in rebuttal if any such evidence was offered by Newfield. Petitioner stated on his motion to preclude that he believed that Newfield was inventing such sources and was covering this up by invoking Civil Rights Law, Section 79h. Witness Newfield's exposed fraud in his claim of having spent

several weeks carefully analyzing records of petitioner's dispositions (Appendix DD, A254-257) and his admitted failure to look at the court files in the four specific cases he wrote about in the same courthouse in which he claimed to have interviewed lawyers.

Since reliance on sources is a matter of defense, the defendants had the choice of producing such evidence or assuming the risk, on claim of confidentiality, of not offering it, and thus taking the consequences of such choice of forgoing such defense. Obviously, Newfield could not have it both ways and on the trial testify that he had anonymous sources and then refuse to answer any questions on cross-examination as to them. The protection afforded Newfield, against contempt, was purely a statutory one. Refusal to name sources is not a constitutional privilege (*Brandenburg* v. *Hayes,* 408 U.S. 665 (1972); *Farr* v. *Pitchess,* 522 F. 2d 464 (1975) cert. den. 427 U.S. 912; *Rosata* v. *Superior Court of California,* 51 Cal. App. 3rd 190, 124 Cal. Reptr. 427 (1975) cert. den. 427 U.S. 912). Even a constitutional privilege is waived by the giving of any testimony at the trial as to the privileged matter (*Brown* v. *United States,* 356 U.S. 148, 155-156 (1958); *Rogers* v. *United States,* 340 U.S. 367, 373 (1951); *United States* v. *Nobles,* 422 U.S. 225, 240, 242 (1975); *Brown* v. *Walker,* 161 U.S. 591, 597 (1896); *McGauthen* v. *California,* 402 U.S. 183, 215 (1971).

The foregoing alleged second hand sources about the *Burton, Glover, Vario* and *Agro* cases which Newfield claimed to have relied on in writing his original articles, became irrelevant and ineffectual when, in the petitioner's prior action the respondents became aware of what actually happened from their reading of the court minutes in those four cases made a part of petitioner's disclosure in that prior action.

Petitioner's claim of malice on the part of the respondents in this case is based on such admitted so acquired knowledge on their part of the contents of such court minutes and their knowledge of the reports of the Association of the Bar (Appendix X, A189) and the Brooklyn Bar Association (Appendix Y, A195) finding the falsity of the articles republished in the book and the Morello and Wexler letters (Appendices U, V, A184, 185) and the interview of Newfield by the Association of the Bar on December 28, 1972 (Appendix X, A190) and the New York Times article on May 16, 1973 (Appendix HH, A279), all of which advised the respondents that their intended republication would be a false publication and that the second-hand information purported to have been relied on by Newfield in writing the original articles could no longer be relied on to support the charges against petitioner made in the original articles when they were republished in the book.

The book "Cruel and Unusual Justice" was in preparation by Holt over a period of almost two years. The articles repeated in the book had already been published and were not "hot news" and there was no urgency about republication (*Curtis Publishing Co.* v. *Butts,* 388 U.S. 134, 155 (1967); *Goldwater* v. *Ginzburg,* 414 F.2d 324, 339 (1969) *cert. den.,* 396 U.S. 1049; *Carson* v. *Allied News Co.,* 529 F.2d 206, 211 (1976); *Church of Scientology* v. *Dell Publishing Co.,* 362 F.Supp. 767, 769, (footnote 1) (1973). Holt's editor Wood was in constant consultation with Newfield during this period about the contents of the book (Appendix FF, A263). This included the period from May 1973 when petitioner commenced his prior suit, which was pending all during that period to April 15, 1974 when the book was published. Wood knew that the petitioner's prior suit involved the falsity of the identical articles which were to be republished in the book, and she thus obviously had the

greatest interest in what was shown in that prior lawsuit about the falsity of these articles.

In his pre-trial disclosure on May 30, 1973 in the prior action of *Rinaldi* v. *Voice*, at which respondent Newfield was present, petitioner produced the court minutes in the four cases of *Burton, Glover, Vario* and *Agro* and petitioner was examined by Voice with respect thereto (Appendix BB, A213). In the course of that examination, petitioner demonstrated to Voice and Newfield the falsity of their published charges against petitioner based on those cases. In addition, on said examination, petitioner produced copies of the letters from Morello (Appendix U, A184); and Wexler (Appendix V, A185) to New York Magazine pointing out the falsity of what Newfield had written about the *Burton* and *Vario* cases.

In his pre-trial disclosure examinations in the prior action in June and October 1973 and in this action (Appendix DD, A247-248) Newfield admitted that he had read the court minutes in those four cases produced by petitioner and the Morello, Wexler and Brooklyn Bar Association letters and he admitted in disclosure in the prior action that if he knew when he wrote the original article about *People* v. *Burton* that the district attorney had recommended Burton's release without additional bail, he would have put that in the story "in plain fairness" and that "if I knew it and withheld that information, it would have been unfair" (Appendix CC, A234). Despite this admission, he failed to include it in the book in which the article was thereafter republished as originally written. Newfield also admitted that his omissions were not due to any space restrictions imposed on him (Appendix CC, A238).

Newfield admitted that he had, prior to the republication of the articles in the book, obtained a copy of the Brooklyn

Bar Association Report (Appendix DD, A249-250) pointing out the inaccuracies in his articles based on the *Burton, Glover* and *Vario* cases (Appendix Y, A197-205). Newfield also admitted that on December 28, 1972 he had been interviewed about his article based on those cases by the Association of the Bar and that when the substance of its Report was published in the New York Times on April 9, 1974, he obtained a copy of its Report (Appendix DD, A250, 251).

In the original article of August 31, 1972 about the *Burton* and *Glover* cases, Newfield wrote (Appendix H, A125):

> "So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit."

Prior to the republication of this article in the book, Newfield knew from his reading of the court minutes in *Glover* that Glover was in a federal jail for five years and had not been put on the street, and he so admitted (Appendix DD, A252). Yet he deliberately had Wood add to the article in the book after the above-quote from the original article, the sentence "Glover, remember, was not an addict but a businessman (Appendix FF, A276). On his pre-trial disclosure in this action he blandly testified that he meant Burton, that he could not have been referring to Glover because he knew Glover was going to the Federal penitentiary (Appendix DD, A252-253). Respondent Holt, from its knowledge of the Court minutes in *Glover* which it had obtained from petitioner's disclosure in the prior action, also knew this inclusion as to Glover to be false.

The respondent Holt in its answer and amended answer admitted under oath that it knew of petitioner's prior action in April 1973, when it was commenced and also of

"plaintiff's sworn testimony in that action" upon "reliance" on which it published the book (Appendix G, A110-111). The petitioner's complaint in that prior action annexed copies of the advertisement which repeated statements from the original articles and the original articles themselves, which are alleged in that complaint to be false (Appendix H, A115).

The respondent Holt's so admitted knowledge of petitioner's pre-trial disclosure testimony in the prior action necessarily included, besides knowledge of his testimony as to falsity, knowledge of the contents of the Court minutes in the four cases produced by petitioner on such examination, as well as the letters from Morello and Wexler (Appendices U, V, A184, 185) which plainly brought home to Holt the knowledge that the charge of "suspicious leniency" to heroin dealers and organized crime figures based on those four cases was false.

A sworn admission in a pleading is the strongest kind of evidence (*Tisdale* v. *Delaware & Hudson Canal Co.*, 116 N.Y. 416, 419 (1889); *Kelly* v. *St. Michaels Roman Catholic Church* (N.Y.), 148 App. Div. 767, 771 (1912); *Hall* v. *United States* (D.C. Cal.), 314 F. Supp. 1135 (1970); Wigmore on Evidence (Chadbourne Rev. 1972) Section 1064 (2); 31A Corpus Jur. Second, Evidence, Section 301).

Also, Newfield testified on pre-trial disclosure that he gave Wood a copy of the article in the New York Times of May 16, 1973 (Appendix DD, A245-246) about the commencement of petitioner's prior action against Voice, which states (Appendix HH, A280):

> "The Village Voice articles on which the advertisement was based asserted that Justice Rinaldi had a 'reputation for going soft on pushers especially when they are represented by certain well-connected bondsmen and lawyers."

> "The Voice also said that the judge's 'judicial temper softens before big heroin dealers and organized crime figures.'"

Newfield testified on pre-trial disclosure that at the time he gave Wood a copy of the Times article of May 16, 1973, he gave Wood the telephone number of Voice's attorney in that action and told her to get in touch with him for information about that suit (Appendix DD, A245). Wood admitted this, (Appendix FF, A272) but said she never did so.

Wood, in her pre-trial disclosure, admitted that prior to the publication of the book she was aware that there was a Brooklyn Bar Association Report (Appendix EE, A266) in her own words "clearing Rinaldi" (Appendix EE, A267) and that she in November 1973 received from Newfield the postscript which is published in the book (p. 108) stating that the Brooklyn Bar Association attacked Newfield's articles as "malicious, unfounded and irresponsible." But she claimed that despite this, she never asked Newfield to let her read his copy of the Report.

Wood admitted that she read the New York Times article of April 9, 1974 reporting that the Association of the Bar Report stated that Newfield had "not substantiated" his charges against Judge Rinaldi (Appendix FF, A273) and that when Newfield obtained a copy of that Report on that day (Appendix DD, A250), he told her "that the Report had stated that he had not substantiated his opinions regarding Justice Rinaldi's incompetence and bias" (Appendix FF, A274).

Wood admitted that she read Gage's Times article of September 25, 1972 (Appendix EE, A262) which stated as to *Agro* that the assistant district attorney had stated that Agro was the least culpable and had no prior record and

recommended the plea and sentence (Appendix H, A138-139). She then read Newfield's article of October 12, 1972, admitted by Newfield to be based on Gage's Times articles (Appendix EE, A262), in which Newfield stated that "Agro pleaded guilty and was given a suspended by Judge Rinaldi" and omitted, what he knew from the Gage article, that the assistant district attorney had recommended the plea and sentence. Yet, in editing the book, Wood left unchanged therein the statement by Newfield (Appendix F, A98):

> "During the fall of 1972, I wrote three more articles detailing suspiciously lenient decisions of Justice Rinaldi. Two of these cases involved Mafia members Paul Vario and Sol Agro and a third involved a narcotics dealer named Clifton Glover."

It is plain from the foregoing that respondent Holt had clear notice of the falsity of its publication about the petitioner and made no further effort to investigate. This Court has held that failure to further investigate after notice of falsity constitutes a reckless disregard for truth or falsity sufficient to constitute malice (*Curtis Publishing Co.*, v. *Butts, supra,* 388 U.S. 130, opinion of Harlan, J. page 162, footnote 23; opinion of Chief Justice Warren pages 169-170, opinion of Brennan, J. page 172; *Church of Scientology* v. *Dell Publishing Co.* (D.C.Cal) 362 F. Supp. 767, 769-770) (1973); *Alioto* v. *Cowles Communications, Inc.* (N.D. Cal.) 430 F. Supp. 1363, 1371 (1977).

B.

Newfield testified as to the manuscript "We went over it and if she (Wood) had any questions I would have to convince her that it was right. She was a professional editor." (Appendix D, A246-247). In editing the August

31, 1972 Voice article for inclusion in the book, Wood saw the heading in large type, "Justice Gets A Fix" (Appendix H, A120) which gives the anticipation and impression to the reader that the article would report venality or corruption on the part of the petitioner. An experienced editor would necessarily say to the author, "Now, wait a minute you don't show any 'fix' in the article," (as Newfield had admitted, Appendix CC, A241) and any responsible editor would then say "the heading must go, we know it is a false heading." Wood, however, knowingly repeated the false and defamatory heading in the book (Appendix I, A140). This constitutes malice (*Sprouse* v. *Clay Communications Inc.* (Sup. Ct. of App. W. Va. 1975) 211 S.E. 2d 674, 686 *cert. den.* 423 U.S. 882; *Carson* v. *Allied News Co., supra* (7 Cir.) 529 F. 2d 206, 212 (1976); *Lawyers Co-Op Publishing Co.* v. *West Publishing Co.* (N.Y.) 32 App. Div. 585, 590 (1898); *Vocational Guidance Manuals* v. *United Newspaper Manuals Inc.,* 280 App. Div. 593, 595 affd. 305 N.Y. 380 (1953); *Rathkopf* v. *Walker* (N.Y.) 190 Misc. 168 (1947); *Campbell* v. *New York Post,* 245 N.Y. 320, 328 (1927).

C.

For the respondents to have charged that "petitioner is suspiciously lenient to heroin dealers and organized crime figures" and "acted suspiciously in ways that defied law and reason" and "is putting people on the street who sell death for a profit," claiming to have based such charges on their claimed information about petitioner's dispositions in four specific cases, though actually knowing from the court records in those four cases, that the charges are false, is clear and convincing evidence of malice on their part" (*Hotchner* v. *Doubleday & Company Inc.* (2 Cir.) 551 F. 2d 910, 913) (1977).

If respondents had published, as they knew to be the fact, that in each of those cases the dispositions were made on the recommendation of the district attorney, for the reasons appearing on the record, such published charge would have been self-destructive and probably never would have been published. Yet the Court below stated that this "omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts and juries have no proper function (*James* v. *Gannett*, 40 N.Y. 2d 415, 424, *supra*). To paraphrase Chief Justice Burger's statement in *Miami Herald Publishing Co.* v. *Tornillo* (418 U.S. 241, 258), the choice of material to go into a book and the decisions made as to limitations in size and content, and treatment of public issues and public officials, whether fair or unfair, constitute the exercise of editorial judgment" (Appendix C, A31).

In *Miami Herald supra*, this Court held a Florida right of reply statute to be unconstitutional since a newspaper as a matter of free press could not be required to print answers to its articles. It was not a libel case. This Court, it is submitted, has not held and did not intend to hold that a defamatory charge of criminality based on a knowing omission of vital facts which demonstrate the falsity of the charge was such a permissible exercise of editorial judgment as to what to print so as to bar any libel action. Such knowing omission of crucial facts is clearly evidence of malice (*Montandon* v. *Triangle Publications Inc.*, 45 Cal. App. 3rd 938, 944, 120 Cal. Rep. 186, 189 (1975), cert. den. 423 U.S. 893; *Varnish* v. *Best Medium Publishing Co.* (2 Cir.) 405 F. 2d 608, 611, 612, 613 (1968) cert. den. 394 U.S. 987; *Goldwater* v. *Ginzburg, supra* (2 Cir.) 414 F. 2d 324, 336, 337 (1969) cert. den. 396 U.S. 1049).

The statement of the Court below that the omissions here are of "relatively minor details" is clearly erroneous. The

author-emanated odor of "suspicious dispositions" evaporates in the context of the district attorney's consent and recommendation of those dispositions.

This is like saying that a publication about a married woman that she was naked in a room with a man not her husband, knowingly omitting to state that the man was a doctor giving her a physical examination, was not a libelous charge of adulterous conduct because the published statement was literally true and that the knowing omission was merely a relatively minor detail.

The omission of the facts in each of the four supporting cases cited by Newfield showing that the district attorney consented to or recommended the disposition is what renders clearly false the charge based on those four cases that the respondent "acted suspiciously in ways that defied law and reason" when heroin dealers and organized crime figures were involved (Appendix F, A99-100).

The Association of the Bar in investigating Newfield's charge that petitioner's "judicial temper softens remarkably before heroin dealers and organized crime figures" stated "as to this charge he gives three cases as examples." The Association of the Bar then examined the court minutes in these cases and, based on the facts which it found Newfield to have omitted, its Report concluded that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

The Brooklyn Bar Association made a similar investigation of this charge and examined the court minutes in these cases and based on Newfield's omission of the material facts as to the consent and recommendation by the district attorney in each case, came to the same conclusion that "the author's treatment of Judge Rinaldi is calculated to create

an impression that is not borne out by the facts. The untruths, half-truths and misrepresentations concern the very heart of the accusations against Mr. Justice Rinaldi" (Appendix Y, A199).

The opinion of Justice Gellinoff denying the motion for summary judgment, on which opinion the Appellate Division affirmed, likewise stated the omitted facts to be crucial (Appendix E, A80-82).

D.

The charge that petitioner is "probably corrupt" "based totally" on his indictment for perjury is a knowingly false statement. All members of the press and publishing world know that in the face of the constitutional presumption of innocence and the lack of probative force of an indictment, it is false to say that an indicted defendant is guilty and for this reason they have never done so, since this would be a malicious defamation for which they would be liable (*Paul* v. *Davis, supra,* 424 U.S. 693, 697 (1976); concurring opinion of White, J. in *Greenbelt Co-Op Publishing Association* v. *Bressler,* 398 U.S. 6 at pages 21-22 (1970); *Patterson* v. *New York,* —— U.S. ——, 53 L. Ed. 2d 281, 292 (1977); *Gregory* v. *McDonnell Douglas Co., supra,* 131 Cal. Rep. 641, 552 P. 2d 425, 435) (1976). Here, besides, the respondents knew that the indictment was for perjury and that the grand jury found no indictment for corruption.

All that the respondents, stretching their statements to the limit of what they thought they could get away with, said of the indictment in the book was (pp. 104-105):

> "On November 12, 1973, Judge Rinaldi was indicted on three counts of perjury by a grand jury impanelled by Special Prosecutor Maurice Nadjari. He was also indicted on one count of obstruction of justice. The perjury involved criminal cases Judge Rinaldi was suspected of fixing. If convicted on all counts Judge Rinaldi could be sentenced to 22 years in prison."

Nevertheless, the respondents made the general statement in another context (Appendix F, A100) that petitioner is "probably corrupt." On pre-trial disclosure, knowing that the respondents had no other possible support for this charge, Newfield testified that it was "based totally on the indictment" (Appendix DD, A257). Since the mere fact of the indictment is no support for a charge of probable criminal conduct, the respondents are without any defense for their malicious charge of "probably corrupt."

E.

With respect to the other charges in the book that petitioner is "very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing (Appendix F, A95) and that "every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia. The Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Judge Rinaldi in organized crime cases" (Appendix F, A102), "he has a reputation among lawyers and court reformers for going soft on pushers, especially when represented by certain well-connected bondsmen and lawyers (Appendix F, A96), "he is cruel or abusive to defendants (Appendix F, A102), "defendants connected with organized crime families were treated permissively," "occasionally large-scale heroin dealers would get inexplicably lenient sentences," "and certain Brooklyn lawyers would almost always win their cases before Rinaldi" (Appendix F, A99-100), the respondents have set forth nothing on their motions for summary judgment to support these statements. (As to the charge that

petitioner was repressive toward black defendants, Newfield admitted on pre-trial disclosure in the prior action of *Rinaldi* v. *Voice* that when he wrote it he had no specific cases in mind (Appendix CC, A241, 242).

As to his claimed careful analysis, prior to writing the original articles, of records of petitioner's previous dispositions (Appendix F, A99) this, as previously noted, turned out on pre-trial disclosure to be a fraud. The Joint Legislative Committee on Crime had made a statistical study of dispositions by all judges of what it called organized crime defendants. Its study consisted merely of the names of the defendants and the dispositions (Appendix DD, A255; Appendix H, A136). No facts in any case were stated. Newfield testified he went to the office of the Committee and there on two sheets copied down the names and dispositions of some of the defendants in three of petitioner's cases (Appendix DD, A258). On their motion for summary judgment, the respondents offered nothing in support of their charge that the "Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" (Appendix F, A102). They did not even present or rely on these dispositions in those three cases. This was plainly because the court records in those three cases show that they were similar to the four cases of *Burton, Glover, Vario* and *Agro* and that such dispositions were made with the concurrence of the district attorney and were in no way "suspicious." Petitioner was prepared to produce the court records in those three cases, but since respondents did not rely on these cases, and did not even refer to them, it was deemed by petitioner unnecessary to do so. Respondents having made these charges should have been required to show that the court records support their version (*Time Inc.* v. *Firestone, supra,* 424 U.S. 448, 459) or any other claimed supporting evidence.

Since the respondents have offered no supporting basis for these charges, it must be presumed that they were made with reckless disregard for their truth or falsity (*Hartley* v. *Conrad and Times Mirror Co.* (Court of Appeals of California, Second Appellate District, Division Three, February 3, 1976 unreported cert. den. for nonfinality of judgment —— U.S. —— 50 L. Ed. 2d 152; *Guam Federation of Teachers* v. *Ysrael* (9 Cir.) 492 F. 2d 438, 439 (1974) cert. den. 419 U.S. 872; *Carson* v. *Allied News Co., supra* (7 Cir.) 529 F. 2d 206, 213 (1976).

In *Hartley* v. *Conrad and Times Mirror Company, supra,* the Court held in denying summary judgment:

> "While respondents made a strong showing of the basis for their charge that appellant's refusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless disregard of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in any way responsible for causing the diversion order."

F.

In dismissing petitioner's suit on a motion for summary judgment, without a trial, the Court below, though agreeing that the award of summary judgment in libel actions is governed by the same rules as in civil actions generally (Appendix C, A32), acted contrary to the fundamental concept of summary judgment as issue finding and not issue deciding in which the existence of an issue of fact requires denial of the motion (*Stone* v. *Goodson,* 8 N.Y.2d 8, 12-13 (1960); *Phillips* v. *Kantor,* 31 N.Y.2d 307, 311 (1972); *Sillman* v. *Twentieth Century Fox Corporation,* 3 N.Y.2d 395, 404 (1957). "The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be ex-

amined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury" (Emphasis by the Court.) (*Guam Federation of Teachers* v. *Ysrael, supra,* 492 F.2d 438, 439, *cert. den.,* 419 U.S. 872; *Church of Scientology* v. *Dell Publishing Co., supra,* 362 F. Supp. 767, 770; *Thomas H. Maloney & Sons Inc.* v. *E. W. Scripps Co., supra,* 43 Ohio App.2d 105, 334 N.E. 494, 499; *cert. denied,* 423 U.S. 883; *Phoenix Newspapers* v. *Church, supra,* 24 Ariz. App. 287, 537 P.2d 1345, 1356, *cert. denied,* 425 U.S. 908, 985; *Rancho La Costa Inc.* v. *Penthouse International Ltd.* (Superior Ct. Cal. April 5, 1976, unreported, cert. den. —— U.S. —— 53 L.Ed.2d 245).

In this case, for example, the respondent Holt on its motion for summary judgment has chosen to claim that its sworn admission in its answer, that since April 1973 it knew of petitioner's prior action and of petitioner's pre-trial disclosure testimony in that action (Appendix G, A110-111), was false and that it did not have such knowledge.

Petitioner's pre-trial disclosure in the prior action took place while the book republishing the articles was in preparation. It is hardly plausible that the respondent Holt would not, as it admitted it did, obtain a copy thereof. It made this admission in its answer because it thought it could base an estoppel thereon. Having abandoned such defense as untenable it seeks to deny what it admitted. If that respondent's sworn admission in its answer is not conclusive against it and it is open to it to say that it lied in that answer, at the very least this in itself, creates a factual issue as to malice which requires a trial and thus a denial of summary judgment (*Talbot* v. *Laubheim,* 188 N.Y. 421, 424 (1907); *Krauss* v. *Birnbaum,* 200 N.Y. 130, 137 (1910); *Brisbane* v. *City of New York,* 8 A.D.2d 882, 883 (1958)).

Also, though Wood admitted in her pre-trial disclosure that she had pre-publication knowledge of the Brooklyn Bar Association Report, as she said, "clearing Rinaldi" (Appendix EE, A267), she says in her reply affidavit on Holt's motion for summary judgment that she did not choose to accept it and thus that such knowledge of the Report's conclusions cannot be imputed to her (Appendix GG, A278). Such knowledge that the Report "cleared" petitioner of the charges made by Newfield in the articles republished in the book, and failure on her part to further investigate, is, at the very least, evidence of reckless disregard for the truth or falsity of the charges which requires determination by the jury as a factual issue. (*Curtis Publishing Co.* v. *Butts, supra; Alioto* v. *Cowles Communications Inc., supra; Church of Scientology* v. *Dell Publishing Co., supra*).

Also, Wood admitted that Newfield told her of his interview by the Association of the Bar on December 28, 1972 about his charges in his article of October 16, 1972 against petitioner (Appendix EE, A268). This was during the period when the book republishing the articles, was in preparation and Wood obviously had to be keenly interested in any investigation of the charges in the articles. When asked on pre-trial disclosure what Newfield had told her about the interview, she took refuge in "I don't remember" (Appendix EE, A268-269). She also admitted that during that period she had discussed with Newfield rumors that the Association of the Bar had made its Report of the results of such investigation (Appendix EE, A267-268), which she was aware, from Newfield's interview by the Committee, would be expected to be unfavorable to Newfield's charges against petitioner.

With respect to the Association of the Bar Report, Wood in her moving affidavit admitted that "I recall reading the

New York Times and Daily News articles (of April 9, 1974) which I recall reported that he (Newfield) had not substantiated his charges against Justice Rinaldi" (Appendix FF, A273). When her original affidavit was made, Wood thought this to be a safe admission, since she coupled it with the statement that copies of the book, whose publication date was April 15, 1974, had been released for sale some weeks before (Appendix FF, A274). However, when the petitioner's opposing affidavit demonstrated that for months thereafter, with knowledge of the Times article and the Association of the Bar Report, Holt continued to sell and promote the book (Appendix II, A281-289), Wood had no compunction, in her reply affidavit, against swearing that she never saw the Times article until after this lawsuit was commenced in August 1974 (Appendix GG, A277). Wood, however, unfortunately for her on this factual issue, which she now created, overlooked the fact that she had also stated in her moving affidavit that "After the City Bar Report had been disclosed and he obtained a copy of it, the author told me that the Report . . . had stated . . . that he had not 'substantiated' his opinions regarding Justice Rinaldi's alleged incompetence and bias" (Appendix FF, A273). Newfield obtained a copy of the Report when it was made public on April 9, 1974 (Appendix DD, A250) and Wood thus then knew of its import, even if she had not, as she had admitted, read the Times article of April 9, 1974.

Also, Wood in her reply affidavit (Appendix GG, A277) states that she never saw the New York Times article of May 16, 1973, reporting that the advertisement sued on was based on the falsity of the statements repeated therein from the original articles republished in the book. Since this would be evidence of knowledge by Wood that in the prior action petitioner claimed the original articles republished in the book to be false, it does not matter to

Wood that she contradicts the testimony, not of the petitioner, but of the respondent Newfield that "I informed her (Wood) when the suit was filed. I believe in May, I showed her the article in the New York Times" . . . "I know I gave her the Times article and told her of the situation, and gave her Victor's phone number if she had any further questions she should confer with Victor" . . . "The only thing I gave Holt was the New York Times clipping about the filing of the suit" (Appendix DD, A245-246).

Petitioner has offered evidence which clearly and convincingly establishes knowledge by the respondents of the falsity of their publication and thus at the very least, that this was a case where "the writer must be aware of the probability that the statement might be false, and knowing that . . . takes a calculated risk and publishes it anyway" (*Varnish* v. *Best Medium Publishing Co., supra*, 405 F.2d 608, 612 *cert. denied*, 394 U.S. 987) and that it was therefore "circulated with reckless disregard for its truth or falsity" (*Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975) and that "the finder of fact must determine whether the publication was indeed made in good faith" (*St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968); *Davis* v. *Schuchat* (D.C. Cir.) 510 F.2d 731, 735 (1975); *Phoenix Newspaper Inc.* v. *Church, supra*, 24 Ariz. App. 287, 537 P.2d 1315, 1355, *cert. denied*, 421 U.S. 908; *Goldwater* v. *Ginzburg, supra*, 414 F.2d 324, 337).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,
IRWIN N. WILPON
Counsel for Petitioner

October, 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

—v.—

HOLT, RINEHART & WINSTON, INC. and
JACK NEWFIELD,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRWIN N. WILPON
135 Willow Street
Brooklyn, New York 11201
(212) 522-1282

Counsel for Petitioner

INDEX TO APPENDIX

APPENDIX A

FINAL ORDER OF COURT OF APPEALS DATED JULY 14, 1977 REVERSING APPELLATE DIVISION AND GRANTING SUMMARY JUDGMENT TO THE APPELLANTS

COURT OF APPEALS
STATE OF NEW YORK
THE HON. CHARLES D. BREITEL, CHIEF JUDGE PRESIDING

No. 222
Dominic S. Rinaldi,
Respondent
vs.
Holt, Rinehart &Winston, Inc.
and Jack Newfield,
Appellants,
The Village Voice, Inc.,
Defendant.

The appellants in the above entitled appeal appeared by Coudert Brothers and Lankenau, Kovner & Bickford

The respondent(s) appeared by Irwin N. Wilpon, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and appellants' motions for summary judgment granted. Question certified answered in the negative. Opinion by Jasen,J

Concur: Breitel, Ch.J.,Jones, Wachtler, Fuchsberg and Cooke, JJ., Breitel, Ch.J.

in a concurring opinion in which Wachtler, J. also concurs, and Fuchsberg,J in result only in a separate concurring opinion. Gabrielli, J., dissents in part and votes to modify in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/sDONALD M. SHERMAN

Deputy Clerk of the Court

Court of Appeals Clerk's Office, Albany
July 14, 1977

APPENDIX B

ORDER OF COURT OF APPEALS DATED SEPTEMBER 7, 1977, DENYING A HEARING

STATE OF NEW YORK
COURT OF APPEALS

AT A SESSION OF THE COURT OF APPEALS HALL IN THE CITY OF ALBANY ON THE SEVENTH DAY OF SEPTEMBER, A.D. 1977

P R E S E N T, HON. CHARLES D. BREITEL, CHIEF JUDGE PRESIDING

MO. NO. 809
Dominic S. Rinaldi

Movant-Respondent,

vs.
Holt, Rinehart & Winston Inc.
and Jack Newfield

Appellants,
The Village Voice, Inc.

Defendant.

A motion for reargument in the above cause having been heretofore made upon the part of the movant-respondent and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the

same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court

APPENDEX "C"

OPINION OF THE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

No.222
Dominic S. Rinaldi
Respondent
vs.
Holt Rinehart & Winston, Inc.
and Jack Newfield,
Appellants,
The Village Voice, Inc.
Defendant.

(222)Victor A. Kovner,Heather Grant Florence & Robert C. Bickford,NY City,for appellant Newfield.Carlton G. Eldridge, Jr.,John M.Keene,III,&Jerry Slater,NY City for appellant Holt,Rinehart.
Irwin N.Wilpon, Brooklyn,for respondent

JASEN,J.:

This is an action for defamation. The plaintiff is a Justice of the Supreme Court,Second Judicial District. His complaint alleges that he was libeled in the book,Cruel and Unusual Justice,authored by defendant Jack Newfield and published by defendant Holt,Rinehart and Winston, Inc. After extensive pre-trial discovery, defendants moved for summary judgment. Their motion was denied by Special Term. The Appellate Division, by a closely divided court,affirmed(53 AD2d 839) but

granted defendants leave to appeal to our court upon a certified question.

The issue before us is whether plaintiff has established the existence of material facts sufficient to create a triable issue on his libel cause of action. More specifically, resolution of this appeal turns on whether plaintiff, a public official, has set forth facts sufficient to generate a triable issue on the constitutional elements of the libel complaint. (New York Times Co. V. Sullivan, 376 US 254.) We hold that defendants' motion for summary judgment should have been granted and, therefore, the order of the Appellate Division should be reversed.

Jack Newfield is a controversial, well-known investigative journalist. In 1972, Newfield focused his attentions on the criminal justice system in New York State, with particular emphasis on the administration of criminal justice in New York City. In the Fall of 1972, he authored five articles on judicial conduct which appeared in the Village Voice, a weekly newspaper. An additional article, "The Ten Worst Judges in New York"

was published in New York magazine. The thrust of these articles was that Judges in the New York City Courts were selected for political reasons and not on the merits of their qualifications for judicial office. Several Judges, identified by name, were described as incompetent or corrupt, and several decisions rendered by these Judges were cited by the author to illustrate his criticisms. The author contended that these Judges were lenient on defendants with political influence and with defendants charged with distribution of significant amounts of narcotics. By contrast, it was asserted, these same Judges were too harsh on defendants from disadvantaged backgrounds, especially on common narcotics addicts charged with comparatively minor offenses. Newfield advocated the removal of these Judges from the bench and called for overall reform of the method of selecting Judges. Listed as among the ten worst Judges in New York was the plaintiff. The Newfield articles were highly critical of plaintiff's judicial performance.

Prior to the publication of the Newfield series, a separate news article ap-

peared in the New York Daily News reporting that Justice Rinaldi was one of the four Judges accused by the Joint Legislative Committee on Crime of handing down "wrist-slap" sentences in felony narcotics cases. During the time that the Newfield articles were appearing, the New York Times published a news story that plaintiff had sentenced an organized crime figure,charged with bribery of a police officer, to a fine of $250, while,on that same day,he imposed a sentence of imprisonment, with a maximum of five years, on a 19-year old youth alleged to have robbed a drugstore.

In May 1973, plaintiff brought an action against the Village Voice and its advertising agency for libel and invasion of privacy committed in an advertisement for the Voice which appeared in the New York Times. The advertisement contained a caricature of the plaintiff and the text referred to the first of the original articles in the Newfield series. Defendant's motion for summary judgment was denied and the action is still pending.(See Rinaldi v Village Voice, 47 AD2d 180, cert den 423 US 883.)The complaint

was predicated on the assertion that, after publication of the original articles, the Voice received information which refuted Newfield's allegations of misconduct.

Plaintiff was indicted on November 13, 1973, by the Extraordinary Special Grand Jury of Kings County on two counts of perjury committed before the Grand Jury. The Grand Jury has been investigating Justice Rinaldi's disposition of two cases unrelated to those reported earlier by Newfield. Upon indictment, plaintiff was suspended from performance of judicial duties. He was acquitted of these charges in August, 1974, and was reelected to the Supreme Court,without opposition in November,1974.

During the pendency of the criminal charges against plaintiff, Holt,Rinehart and Winston, Inc., a publishing house published a book by Jack Newfield entitled "Cruel and Unusual Justice".The book consisted largely of reprints of Newfield's original Voice and New York magazine articles. The articles were edited slightly for style and form during the course of preparation of the book and were updated through the addition of postscripts. The book is divided into two

parts. The first part, "Prisons",related to a description of alleged abuses committed in various penitentiaries located in New York State. The latter portion of the book, "Courts",contains the reprints of Newfield's original series on judicial performance and selection in New York City.

Plaintiff commenced this action for libel against Newfield, Holt,Rinehart and Winston, and the Village Voice. Special Term granted summary judgment to the Voice on the ground that the Voice had merely acquiesced in the republication of the alleged libel. However,motions by the other two defendants for summary judgment were denied. On cross-appeals,the Appellate Division affirmed. The only issue presented to our court is whether the separate motions for summary judgment of defendants Newfield and Holt,Rinehart and Winston were properly denied.

Plaintiff alleged,in his complaint, that defendants maliciously published false,scandalous and defamatory matter by which defendants meant "that the plaintiff was and is a corrupt, venal, biased, incompetent and unqualified justice of

the Supreme Court of the State of New York who should be removed from office." The particular statements in each chapter contended to be objectionalbe may be briefly excerpted and summarized.Importantly,the passages of the book to which we refer are only those specifically put at issue by the plaintiff's complaint. Equally important,the passages that are at issue contain serious charges that have never been substantiated in a court of law. The ultimate truth of the Newfield charges has never been determined. Of the greatest significance, and an important caveat, our references to, and discussion of, the Newfield charges at the root of this case, in no way reflect any view as to the accuracy,or even the legitimacy, of the extremely grave accusations that have been made by Newfield against the plaintiff.

In a chapter entitled, "The Ten Worst Judges in New York", Newfield wrote that plaintiff "is very tough on long-haired attorneys and black defendants, especially on questions of bail, probation, and sentencing. But his judicial temper softens remarkably before heroin

dealers and organized crime figures." Newfield set forth three illustrative cases. In August 1972,a narcotics distributor, Norman Burton, with a history of 12 prior arrests, had been held on a charge of heroin possession and on a charge of attempted bribery of a police officer. Plaintiff released Burton without bail. In October 1970,another narcotics dealer, Clifton Glover, had been permitted to plead guilty and was then given a conditional discharge.Glover could have received a maximum sentence of 25 years imprisonment.Glover had been charged with a Class C felony for which the statute specifically prohibited the imposition of conditional discharges. The third case, People v. Vario, arose in Suffolk County, where plaintiff was assigned for the summer of 1967. Plaintiff "caused a local scandal" by permitting three prominent organized crime figures, charged with bribery and conspiracy to plead guilty to misdemeanors and assessing only $250 fines. The prosecutor had recommended that the three each serve at least one year in prison.

In a second chapter, "Justice Gets A

Fix", Newfield again reported plaintiff's dispositions in People v Burton and People v Glover. With reference to his release of Burton without bail, it was stated, "[t]his was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers". Newfield wrote that "what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit." It was reported that, in the Burton case, plaintiff "abused" the officer who had reported the bribery attempt.

Newfield stated that he had spent several weeks carefully analyzing records of plaintiff's previous dispositions. Newfield detected a "disturbing pattern". "Blacks and Puerto Ricans got high bail and long sentences. Defendants connected with organized crime families were treated permissively---motions granted, misdemeanor pleas accepted, suspended sentences given, fines imposed instead of jail terms. Occasionally large-scale heroin

dealers would get inexplicably lenient sentences, even conditional discharges, for Class A. felonies. And certain Brooklyn lawyers would almost always win their cases against Rinaldi. My instincts smelled a rat. I decided to begin a personal crusade to alert the judicial, legal and political establishments to this incompetent and probably corrupt member of the judiciary."

Although these two chapters contained the bulk of the criticism of plaintiff, plaintiff was also mentioned in several other portions of the book. Newfield advocated the removal of plaintiff from judicial office, asserting that there was a "sufficient pattern of incompetent decisions" made by plaintiff" to justify the rare spectacle of a judicial trial. "Further, Newfield contended that plaintiff has "influential friends outside the court system", as evidenced by his assignment to Suffolk County part of the year, despite the objections of the local District Attorney. Plaintiff allegedly was "cruel and abusive to defendants". Finally, it was reported that "[e]very law enforcement agency in the state is

aware"of plaintiff's" reputation for going easy "on members of organized crime. Assertedly, "the Joint Legislative Committee on Crime has a whole file full of suspicious dispositions" by plaintiff in cases involving organized crime.

In his complaint, the plaintiff alleged that, as a result of the book, his good name and reputation have been damaged and he has been held up to public scorn, ridicule and contempt. He sought $5,000,000 in damages. No special damages were alleged. Plaintiff's contention is that Newfield failed to accurately report the facts of the cases relied upon to illustrate his conclusion that plaintiff was "incompetent", "probably corrupt", and "suspiciously lenient". He points to the fact that, in People V. Burton, the defendant was before him solely on the bribery charge and not for any drug offense. Another Judge had previously released Burton without bail on the drug charges and plaintiff, with the consent of the District Attorney, followed the prior disposition. However, the transcript of the proceedings indicates that plaintiff had originally

decided to put the defendant in jail and did not change his decision until after he had an angry altercation with the arresting officer. In reference to People v. Glover, plaintiff admits he imposed an illegal sentence, but contends that this was done, again with the prosecutor's consent, so that defendant might immediately commence service of a federal sentence (which was based upon a judgment on which the time to appeal had expired). Thus,Glover was not freed and permitted to walk the streets, as alleged by Newfield. On the other hand, concurrent sentencing would have achieved the same result without the need to violate the Penal Law. Plaintiff also contends that he permitted the misdemeanor pleas in People v Vario because the prosecutor recommended it in light of an appellate decision which directed the suppression of wiretap evidence crucial to the felony count. Yet, the transcript does reflect that plaintiff assessed only fines, whereas the prosecutor had sought one-year terms of imprisonment. [1]

There is a fourth case in dispute as well, People v Agro, mentioned in the

New York Times account. In this case, defendants were charged with having conspired to swindle large sums of money from Macy's department store. Upon the recommendation of the prosecutor, all defendants were permitted, by plaintiff to plead to petit larceny. Plaintiff subsequently gave Salvatore Agro a suspended sentence. The official transcript reflects that only the attorney for the defendant, and no prosectuor appeared at the sentencing proceeding.

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1 There are three relatively minor inaccuracies which are conceded by Newfield and upon which plaintiff does not place any degree of reliance. Newfield had reported that all three defendants in the Vario case had received $250 fines. However, only the principal defendant, Paul Vario, received such a fine. The other two defendants were fined $500. In People v. Glover,the maximum sentence which defendant could have received was 15 years imprisonment, not the 25 year term reported by Newfield. Finally, as discussed in text, Norman Burton had been arraigned solely on the bribery charge,not upon both bribery and drug selling charges as Newfield had written. However,plaintiff was,admittedly,aware of the narcotics charges that gave rise to the bribery allegation.

Plaintiff also relies upon two reports which found Newfield's accusations to be without merit. The first report is by the Brooklyn Bar Association and is dated November 13,1972. This report was issued after the publication of the original article but prior to the publication of the book. In the book,Newfield refers to the report and quotes from it. Newfield countered the report by writing that the author of the report was a "Court Street" lawyer "with ties to the Brooklyn clubhouses" and had interviewed only the plaintiff in preparing the report. The second report, dated June 8, 1973, is by the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York. Although the report is dated prior to the publication of the book, the copy in this record is marked "confidential" and the report was not actually released until 10 months later, after "Cruel and Unusual Justice had been printed and shipped to retail outlets for sale. However, both reports concluded that Newfield's accusations against plaintiff were unfounded.

There is only one further fact to

be noted. In the course of an examination before trial, Newfield stated that the sources for some of his disparaging comments about Justice Rinaldi were attorneys, some from the Legal Aid Society, who regularly practice in the Brooklyn Courts. While he disclosed the indentity of a few of his sources of information, Newfield, for the most part, invoked the benefits of a statute shielding newsmen from contempt for failure to reveal a news source. (Civil Rights Law §79-h.) His authority to do so has not been challenged but the defendants have been precluded from calling as witnessess at the trial any source who Newfield refused to identify.

It is true, as noted by the dissent (slip op, p 2), that Newfield in the course of an examination before trial in the earlier action against the Voice, made a self-serving statement that he had not intended to allege corruption or venality. It is also true, and more to the point, that, in Newfield's answer in this action, it was admitted that the articles complained of "speak for themselves". Newfield's affidavit, submitted on the summary judgment motion in this action, specifically

states that it is his contention "that the allegedly defamatory material originally published in the Voice (and later republished in [the book]) was true at the time of publication." Indeed, he later asserted that "at the time I completed work on [the book], I had no reason to doubt the accuracy of the material contained therein and to this very day continue to believe in the accuracy of all the factual material contained in the book, as well as the reasonableness of the many opinions I drew therefrom." It is concluded, then, from a realistic appraisal of the record that, aside from three minor inaccuracies upon which plaintiff places no reliance, the truth of the statements made by Newfield, including the ultimate accusation of corruption, is in open dispute.

To begin with, we have no doubt that the complaint states a good cause of action for libel per se and that there was no need for plaintiff to allege special damage. "Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule,aversion or disgrace, or induce

an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." (Sydney v Macfadden Newspaper Publishing Corp., 242 NY 208, 211-212; Gates v New York Recorder Co., 155 NY 228, 231, 232.) Certainly, to falsely state that a Judge is incompetent and corrupt, especially where, as here, there are strong undertones of illegality, is to hold him up to disgrace and contempt. Thus, unlike James v Gannett Co. (40 NY2d 415, mot for rearg den 40 NY2d 990), there is no question but that at common law, as it stood prior to New York Times Co. v Sullivan (276 US 254,supra), the statements complained of are defamatory. But the matter does not end there.

The plaintiff is a public official and this libel action is, therefore, governed by the constitutional principles first enunciated in New York Times Co v Sullivan (376 US 254, supra) In the Times case, the Supreme Court took note of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and

that it may well include vehement,caustic and sometimes unpleasantly sharp attacks on government and public officials.(376 US at p 270.) The court ruled that the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the official proves that the statement was made with actual malice-i.e.with knowledge that the statement was false or with reckless disregard of whether it was false or not.(376 US at pp279-280.) The constitutional standard requires that the plaintiff establish the existence of actual malice by proof of "convincing clarity". (376 US at pp 285-286.)

More recent decisions make clear the great extent to which New York Times and its progeny have altered traditional rules governing libel actions. At common law, the libelous statement was presumed to be false and the defendant carried the burden of pleading and proving, in defense that the statement was true. (See,. e.g., Prosser, The Law of Torts [4th ed],§116; p 798; Seelman, The Law of Libel and Slander in New York, §§ 170,392.) Although there has been doubt (See Restatement),

Second, Torts,§582 and comment thereon), the burden is now on the libel plaintiff to establish the falsity of the libel. (Cox Broadcasting Corp. v. Cohn, 420 US 469, 490.) This requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact,false.

The nature of the statement is critical. The First Amendment does not recognize the existence of false ideas. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (Gertz v Robert Welch, Inc., 418 US 323, 339-340.) Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinion are set forth. (Buckley v Litell, 539 F2d 883, 893, cert den____ US____,97 S Ct 785,786; Restatement, Second Torts, §566.)

Especially in a state in which Judges are elected to office, comments and opinions on judicial performance are a matter of public interest and concern. The rule of the Times case was designed to protect the free flow of information to the people concerning the performance of their public officials. (Garrison v Louisiana,379 US 64, 77.) The public, clearly, has a vital interest in the performance and integrity of its judiciary.

The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office, is safeguarded. (Cf.,Old Dominion Branch No. 496, Assn. of Letter Carriers v Austin 418 US 264,283-284.) Erroneous opinions are inevitably made in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. (See New York Times Co. v Sullivan, 376 US 254, 271-272, supra.) Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance,

no matter how unreasonable, extreme or erroneous these opinions might be. (See Hotchner v Castillo-Puche, 551 F2d 910, 912.)

"Judges are supposed to be men of fortitude, able to thrive in a hardy climate." (Craig v Harney, 331 US 367, 376.) Judicial office is not a place for those who are over-sensitive to comments made in public press. As Mr. Justice Powell stated in Gertz v Robert Welch, Inc.(418 US 323,344,supra):"An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." Judicial office demands an even higher price. Judges are constrained, by principles of judicial ethics, to refrain from engaging in unseemly public debate. (Cf., Code of Judicial Conduct, Canon 3[A][6].) Obedience to the rule of silence can be painful when matters of personal integrity are at stake.

Whether a particular statement constitutes fact or opinion is a question of law. (Old Dominion Branch No. 496,

Assn. of Letter Carriers v Austin, 418 US 264, supra; Gregory v McDonnell Douglass Corp., 17 Cal3rd 596,___,552 P2d 425, 428.) To state that a Judge is incompetent is to express an opinion regarding the Judge's performance in office. Likewise, to advocate a Judge's removal from office is to express the opinion that the Judge is unfit for his office. Both opinions, even if falsely and insincerely held, are constitutionally protected, if the facts supporting the opinion are set forth. Here, Newfield set forth the basis for his belief that plaintiff is incompetent and should be removed. Based upon the facts stated and public debate provoked by the statements, each reader may draw his own conclusion as to whether Newfield's views should be supported or challenged. In short, the matter is subject to public debate. Plaintiff may not delimit that debate by seeking to punish, through libel damages, those who would contribute to the debate through the circulation of strong, even harsh, contrasting opinions. By our holding, we do not necessarily imply our acceptance of Newfield's views; we say only that he has the right to express and circulate his opinion, whether he is right or not.

Newfield's assertions that plaintiff is"probably corrupt" and that his sentences of certain defendants were suspiciously lenient, with their strong undertones of conspiracy and illegality, rest on a different footing than his opinions as to plaintiff's judicial performance. These words were not used merely in a "loose, figurative sense" to demonstrate Newfield's strong disagreement with some of plaintiff's dispositions. (See Old Dominion Branch No. 496, Assn. of Letter Carriers v Austin, 418 US 264, 284, supra.) The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. (Gregory v McDonnell Douglas Corp., 17 Cal3rd 596___,552 P2d 425,430; cf., Palm Beach Newspapers Inc. v Kelly, 334 So2d 50, 52; St. Amant v Thompson,

390 US 727, 730; but see Garrison v Louisiana, 379 US 64, 76-77, supra.) While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. (Gregory V McDonnell Douglas Corp., supra; cf., James v Gannett Co., 40 NY2d 415, supra.)

Here, plaintiff has not set forth sufficient evidentiary facts to generate a triable issue of fact as to the falsity and actual maliciousness of the accusations of criminal conduct. It is the plaintiff's burden to establish that he is not "probably corrupt" and that no sentences were unduly lenient. Although plaintiff was acquitted of criminal charges, the acquittal came after publication and involved dispositions other than the ones at issue in this case.

While plaintiff has established that Newfield omitted certain facts from his statement of the cases, Newfield's overall accusations have not been rebutted by anything more than a general denial of wrongdoing. Hence, there are no evidentiary facts which would support plaintiff's claim that Newfield's accusations are false. Further, there is no triable issue as to actual malice. Newfield did undertake a certain amount of investigation and there is no proof that he published his allegation of probable corruption knowing that allegation to be false or in reckless disregard of its truth. Even if his accusations are false, as they may well be, the Constitution, as interpreted by the United States Supreme Court, bars recovery.

As to Holt, Rinehart and Winston, the case is even stronger. The publisher placed its reliance upon Newfield's reportorial abilities and there is no showing that Holt, Rinehart and Winston had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of its reporter. (E.g., James v Gannett Co., 40 NY2d 415, 424, supra; St. Amant v Thompson, 390 US 727,

733, supra; Trails West v Wolff, 32 NY2d 207, 219.) Indeed, the New York Times article and plaintiff's subsequent indictment lent credence to Newfield's account. Similarly, the publisher could elect to credit its author's version of the facts as well as his reasons for discrediting the Brooklyn Bar Association report. That the articles drew criticism when originally published did not preclude a responsible publishing house from reprinting them. (See also Edwards v National Audubon Society, ___, F2d ____ [decided May 25, 1977].)

It is true, of course, that false statements of fact can be actionable. However, the omissions in this case are not so material as to alter significantly the conclusion to be drawn from the episodes reported. (Cf., Hotchner v Castillo-Puche, 551 F2d 910, 913-914, supra.) Although a sentencing court may place a certain amount of reliance upon representations of the attorneys appearing before it, including, of course, prosecutors, the court, and not the prosecutors, has the ultimate responsibility for the sentences imposed. Furthermore, the book was clearly not

designed to be an objective account of plaintiff's judicial dispositions. The book took definite editorial positions on significant issues and advocated reforms and corrective action. Plaintiff was not the central focus of the book. It was a book written from a subjective, rather obvious, point of view and did not purport to be anything else. Although he could not make up facts out of the whole cloth (cf., Spahn v Julian Messner, Inc., 21 NY2d 124, app dsmd 393 US 1046), omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function. (James V. Gannett Co., 40 NY2d 415, 424, supra.) To paraphrase Chief Justice Burger's statement in Miami Herald Publishing Co., V Tornillo (418 US 241, 258), the choice of material to go into a book and the decisions made as to limitations on size and content, and treatment of public issues and public officials, whether fair or unfair, constitute the exercise of editorial judgment. "It has yet to be demonstrated how governmental regulations of this crucial

process can be exercised consistent with First Amendement guarantees of free press as they have evolved to this time." Moreover, the factual omissions are not at the root of this action. The gravamen of the complaint is directed at the opinions advocated by Newfield and, for the reasons previously set forth, those opinions are not actionable.

The award of summary judgment in libel actions, as in civil actions generally, is appropriate where there are no material triable issues of fact. (E.g., CPLR 3212; James v Gannett Co., 40 NY2d 415, supra; Chapadeau v Utica Observer, 38 NY2d 196, 200; Trails West v Wolff, 32 NY2d 207, 221, supra; Gilberg v Goffi, 21 AD2d 517, 527, affd 15 NY2d 1023; Banelin v Pietsch, ____ Idaho ____[1977].) After a thorough review of the extensive record compiled in this case, we are of the view that plaintiff has failed to establish the existence of triable issues, which, if resolved in his favor, would warrant a finding of libel liability. The defendants' motions for summary judgment should have been granted.

With reference to the dissent, it should be noted that the rule of the

Times case is not to be applied woodenly or mechanically. The principles established in New York Times v Sullivan and developed in subsequent cases, represent significant protections for the lifeblood of a free, fair, responsive and reasonable press. To be independent of political influence, to inform the reading public on matters of concern and interest, and to perform its important, yet formal, task, especially valued in this decade, of lightshedding on the activities of government officials, the press must be safeguarded from crippling libel suits, brought to punish those who exercise free speech and to deter others, by chilling the atmosphere, from expressing disagreement in public forums. To be sure, the standards enunciated in the Times case are strict. But laxity is not permitted here, because under Federal constitutional principles, loose rules and only casual judicial review with a bias toward the tort plaintiff would hamper the operations of the free press. Judge J. Edward Lumbard has stated the guiding principles well. "These strict tests must sometimes yield harsh results. Individuals who are defamed may be left

without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of First Amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech." (Hotchner v Castillo-Puche, 551 F2d 910, 913.)

In response to Judge Fuchsberg's concuring opinion, only two comments are necessary. It is totally unwarranted to suggest that, somehow, judicial immunity from libel suit bears on, or relates to, the imposition of a constitutional burden of proof on a Judge who brings a libel action. Quite apart from whether the statements of Judges should be privileged, Judges are public officers to whom New York Times Co. v Sullivan is applicable. This is the point of the majority opinion.To this extent, the concurring opinion reflects

a misunderstanding of the constitutional law of libel.

Secondly, the comments made in the same concurring opinion with respect to the desirability of increasing the effectiveness of the legal profession in rising to the defense of allegedly falsely maligned Judges are expressly disapproved. Whether the organized legal community should develop rules to govern the question of protecting Judges from assertedly unfair criticism is a matter for the legal community itself to resolve. It would be tasteless and inapt for our court as an institution, or for any one of us, to express any view on this matter at this time, much less approvingly cite proposed rules only recently put forward for discussion purposes. Finally, we have no doubt that the profession will, as it has always done, rise to the defense of reputable Judges falsely accused in the public press. Indeed, in this case, two different bar associations studied the matter and publicly supported the plaintiff. The honorable will be doubtless defended; only those whose conscience is stained need fear.

To conclude, the Supreme Court has

required that a libel plaintiff who is a public official must carry a constitutional burden of proof with convincing clarity. On this record, we cannot say that there are triable issues of fact, which if resolved in plaintiff's favor, would permit a jury to conclude that the constitutional burden of proof by convincing clarity has been satisfied.

Accordingly, the order of the Appellate Division should be reversed and defendants' motions for summary judgment granted. The question certified by the Appellate Division is answered in the negative.

The following concurring and dissenting opinions are rerported as follows:

Concurring opinion of Breitel, CJ and Wachtler, J. 42 NY 2d at page 386.

Concurring opinion of Fuchsberg, J. 42 NY 2d at pages 386 - 387.

Dissenting opinion of Gabrielli, J. 42 NY 2d at pages 387 - 392

RINALDI v HOLT RINEHART

#222

BREITEL, Ch. J. (concurring):

I concur in result and subscribe to the opinion of Judge Jasen. I do so however on the constraint of the controlling Supreme Court cases which at this time place undue burdens of proof on the defamed, whether public officials or private persons injected into the arena of public interest. For an illustration, I find it virtually impossible to bear the burden of proving that one is not "corrupt" or "probably corrupt". Moreover, ordinarily, the test of clear and convincing evidence of malice would be one addressed as an evidence-weighing standard for fact-finders to follow rather than a standard applied as a matter of law on summary judgment. Yet the present state of the law as declared by the Supreme Court makes necessary the implications and analysis cogently drawn by Judge Jasen. Consequently, I vote to reverse and dismiss the complaint in accordance with the majority opinion.

RINALDI v HOLT RINEHART & WINSTON, INC.
CASE NO.: 222

FUCHSBERG, J. (concurring):

While joining the decision to reverse I believe some additional comments about the position of a judge who is unfairly maligned are in order.

To discourage a possible inhibition of the vigorous, forthright and independent performance of their official duties, judges, in our society are afforded an absolute immunity from any suit arising therefrom (e.g.,Pierson v Ray, 386 Us 547). The existence of such an immunity though not rooted in constitutional principles alone (Yates v Lansing, 5 Johns. 282 [Kent, C.J.], affd. 9 Johns 395), renders the role of public criticism of the judiciary all the more critical. If anything, it emphasizes the fact that judges are entitled to no exemption from the virtually absolute protection accorded by the First Amendment to public expression regarding public officials generally. It is generally agreed that one of the supporting pillars of our society, perhaps more so now than when life was less impersonal, is the rigorous enforcement of this right.

Thus, assuming that the defendants' comments about Judge Rinaldi were, as he painstakingly points out, one-sided, inaccurate and unfairly damaging, the remedy, as with so much other false or unwise speech, has to be "more speech, not enforced silence"(Whitney v California, 274 US 357, 377 [Brandeis, J. concurring]). None of us can be unsympathetic to the real anguish that unwarranted attacks can engender. But public need outweighs personal considerations.

Perhaps the answer lies in judges themselves. We must recognize that, in the absence of facts tending to prove actual malice, all criticism of the judiciary is protected; in that regard, I must say I am somewhat less persuaded than is the majority by the distinction it draws between "opinions" and "accusations" or that the latter is entitled to lesser constitutional protection than the former. In any event, if the fact is that judges may be subject, without legal recourse, to attacks, which sully their reputation without cause, I most respectfully, but firmly, suggest it is the ob-

ligation of the legal community to speak out in their defense in such circumstances with greater effectiveness. I further suggest, with equal respectfulness and equal firmness, that, in such a matter, which bears on public confidence in the administration of justice, it is most appropriate for us to say so. (For movement in that direction, see, generally, Rules for Responding to Unjust Criticism Proposed by Judges, New York State Bar Association, State Bar News, vol 19, no. 4, June, 1977, p.8.)

GABRIELLI, J. (dissenting in part):

I respectfully dissent as to the grant of summary judgment in favor of the defendant Jack Newfield. As the majority quite properly observes,the charge that plaintiff is "probably corrupt" is a statement of fact and not an expression of opinion.[1] To utter a charge that someone is "corrupt" or "probably corrupt" is to assert that the individual is, as a matter of fact, guilty of a crime or an act of moral turpitude (compare Buckley V Littell, 439 F 2d 882,895; cert den ___ US ___,97 S Ct 785, where the court held that defendant's charge that plaintiff was a "libeler"was a defamatory statement of fact; Edwards v New York Times,___ F 2d ___[dec'd May 25, 1977] in which the court held that defendant's statement that plaintiffs

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1. A charge of corruption goes essentially to the motive behind an individual's acts. As one court has noted,"[t]he state of a man's mind is as much a fact as the state of his digestion "(Edgington v Fritzmaruice,29 Ch D 459,483 [CA]).

were "paid liars" was defamatory because it implied corruption and did not merely constitute a poor opinion of scientific integrity; cf Rosenblatt v Baer 383 US 75). There may be those who find difficulty in the precise delineation of the distinction between fact and opinion but I submit that defendant Newfield's statement of "probable corruption" in the context of this case must be categorized as factual in nature. The statement is not one of opinion or comment as to plaintiff's judicial ability or fitness for office,or a characterization of his attitude toward the various categories of litigants appearing before him,but is instead a specific and pointed assertion relating to his honesty and integrity which should be deemed libelous per se (cf Beaney, Libel and the First Amendment, A New Constitutional Privilege, 51 Va L Rev 1, 10-13). Thus, I agree that the charge of corruption stands on a different footing from some of the other comments with respect to plaintiff's competence and fitness for judicial office. I reject however, the majority's conclusion that plaintiff has not met his burden of proving that

he is not "probably corrupt". There is no burden upon him to do so at this state of the lawsuit. On a motion for summary judgment to dismiss the complaint it is necessary only that a genuine issue of fact be shown to exist and, of course, it is manifestly significant and important to recognize as we must, that all factual inferences must be drawn in favor of the party opposing the motion (6 Carmody-Wait 2d §39.29, p 476). Plaintiff has advanced a sufficient showing of the falsity of the charge of corruption to survive the present motion. The Report of The Association of the Bar for the City of New York concluded that "Newfield failed to substantiate his charges against Justice Rinaldi". Several counts of the indictment against plaintiff were dismissed and he was acquitted following a jury trial of the remaining counts. Other sources including the Brooklyn Bar Association and attorneys familiar with the cases reported by Newfield, indicated the inaccuracy and incompleteness of his version of Judge Rinaldi's sentencing

and bail decisions in those cases. In his moving papers, defendant does not assert the truth of the statement that plaintiff is "probably corrupt", nor does he attempt to advance any support for that statement. Contrary to the majority's belief, Newfield's assertion that the "allegedly defamatory material originally published in the Voice *** was true" does not relate to the charge that plaintiff is "probably corrupt" which did not appear in the original articles. Newfield himself, in fact, stated that "in none of these [Voice] articles do I allege corruption or venality".

It must be concluded that Newfield's additonal characterization of the plaintiff as "suspiciously lenient" is libelous <u>per se</u> for, even as states the majority,"***we have no doubt that the complaint states a good cause of action for libel <u>per se</u> since it is the law that: [a]ny written or printed article is libelous***if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace". Indeed the majority concedes that the characterization of plaintiff as "suspiciously lenient"

stands as an accusation of criminal behavior which is not constitutionally protected (slip opn p 13).

This brings me to the crucial issues in this case: whether plaintiff's cause of action against defendant Newfield may survive a motion for summary judgment on the issue of actual malice. [2] Notwithstanding the propriety of the vehicle of summary judgment in a libel case (see Trails West v Wolff, 32 NY 2d 207, 221) to prevail on a motion for summary judgment the moving party must demonstrate that there are no triable issues of fact (see generally 4 Weinstein, Korn & Miller, ¶3212.05 [c]). As indicated above, it is of utmost importance that, in determining such a motion, the court must draw all

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2. I am required to concur in the majority's disposition of the case with respect to defendant Holt, Rinehart and Winston. The record does not sustain a finding that the publisher possessed a high degree of awareness or serious doubts as to the fasity of the claim of corruption. Holt reasonably relied on defendant Newfield's investigative reporting (cf Edwards v New York Times, supra, although it later developed to be without factual foundation or warrant.

inferences of fact in favor of the party opposing the motion (6 Carmody-Wait 2d, p 476); and a motion for summary judgment should be granted only when it is absolutely clear that no triable issue of fact is presented (Siegel, Practice Commentaries CPLR 3212.1, McKinney's Cons Law of NY, Book 7B, p 424). On the facts of this case as revealed in the pleadings and the motion papers, one is compelled to conclude that the question of defendant Newfield's actual malice must be submitted to the jury. In this case, "[t]he finder of fact*** [should] determine whether the publication was indeed made in good faith"(St Amant v Thompson, 390 US 727,732). Defendant Newfield has advanced no basis other than plaintiff's dismissed indictment for his charge of corruption. The facts pertaining to the dispositions of various cases by plaintiff reported on by the defendant did not provide the factual basis for the charge. Newfield was aware that the articles were factually incomplete and presented a biased view of Judge Rinaldi's decisions. While such a presentation could not, of course,

itself be the basis of a libel action, the omission of glaring facts favorable to Judge Rinaldi bears significant relevance to the issue of actual malice. Attorneys having knowledge of the specific cases reported by Newfield had written letters to New York Magazine and The Village Voice, the publishers of the original articles, identifying specifically the misleading and incomplete portions of Newfield's accounts. Newfield was made aware of the content of these letters during his deposition in a prior, separate action for libel based on the publication of the original articles (Rinaldi v Village Voice 47 AD 2d 180, cert den 423 US 883). That deposition of course, preceded the publication of the book which generated the instant libel action. Also, prior to the publication of the book Newfield had received a copy of a report by the Brooklyn Bar Association which outlined the inaccuracies and omissions in Newfield's accounts of certain cases presided over by plaintiff. Newfield also admitted reading the minutes in those four cases which themselves confirmed the unbiased

report made by the Bar Association. In light of this undisputed knowledge, there is, at the very least, a triable issue of fact whether Newfield had "serious doubts" as to the truth of the charge of corrpution. The defendant places great reliance on the fact that plaintiff had been indicted for perjury and obstruction of justice to negate the claim of actual malice. However, the indictments in those cases were in no way related to the cases which were the subject of Newfield's book. Furthermore, the indictment provides no independent basis for the statement of probable corruption because an indictment has no probative value (People v Cook,37 NY 2d 591, 596). As defendant is undoubtedly aware, in our system of law, a person is presumed innocent until proven guilty. On the basis of the specific allegations of fact concerning defendant Newfield's awareness of the lack of support for his charge of corruption, I do not believe that it would be proper to conclude at this stage that plaintiff could not, as the law requires, establish with clear and convincing evidence that defendant

Newfield's statement was made with knowledge of falsity or reckless disregard of truth or falsity (Kent v City of Buffalo, 29 NY 2d 818,819; New York Times v Sullivan, 376 US 254, 279-280; Gertz v Robert Welch, Inc.,418 US 323,342.These specific allegations of evidentiary fact compel a denial of defendant Newfield's motion for summary judgment; if proved at trial, they would provide ample support for a jury finding that Newfield certainly entertained "serious doubts" concerning the truth of the statement that plaintiff was "probably corrupt" (compare, Indig v Finkelstein, 23 NY 2d 728, 729; Stillman v Ford, 22 NY 2d 48, 53; Shapiro v Health Ins Plan of Greater NY,7 NY 2d 56, 63). On the record in this case the issue of clear and convincing evidence is, as indeed it should be, one for the jury to pass upon. To require any plaintiff to demonstrate by motion papers the existence of a triable issue of fact with respect to "actual malice" more clearly and convincingly than plaintiff has done in this case is to summarily foreclose the possibility of ever bringing a libel action to the trial stage. Even the United States Supreme

Court has not sought to erect so formidable and impenetrable a barrier for plaintiffs in libel actions. By its decision in this case, the majority today effectively outlaws the disposition of libel cases except by summary judgment in favor of defendants. Even more foreboding is the fact that today's decision makes public officials fair game for those who are quick to fire off allegations of wrongdoing on the basis of knowingly or recklessly false and inaccurate report. I cannot conclude that the New York Times v Sullivan rule was intended to render public officials the helpless targets of reckless reporting and ill-founded allegations of corruption.

In conclusion, it should be emphasized that this case presents a delicate and difficult dilemma. We are profoundly committed to a strong and free press especially in the area of political debate and critique of government,even to the extent that a certain degree of harm to the reputation of public officials will be permitted in order to preserve the unimpeded flow of information to the

public and to prevent the muffling of the critic's voice (see Time Inc v Pape, 401 US 279, 290-292; New York Times v Sullivan, supra, p 279). Indeed, our society is probably unique in its tolerance of sharp and robust criticism of public officials and government. On the other hand, however, we are equally committed to individual rights and in particular to the guarantee that one is presumed innocent until proven guilty in accord with the mandates of due process of law (US Const, XIV Amendment). Situations arise when these rights come into conflict. The task of balancing the competing interest may not be shirked by the ritualistic incantation of the rule of New York Times v Sullivan, (supra), as the majority concedes. Rather the balancing must be achieved by a painstaking examination of the particular facts of each individual case in which the rights of the press and the rights of the individual are counterpoised. Newfield may entertain and express whatever opinion he may have concerning plaintiff's judicial abilities and his performance of the duties of his office. His

right to do so is the very essence of the First Amendment. However, to state that a public official is guilty of illegal conduct without any factual basis whatsoever or with a knowingly inadequate foundation to support such a statement (as in this case where Newfield was made aware of the gross errors in factual statements he made before the book was published) should not fall within the sphere of expression protected by the First Amendment. The harsh and drastic remedy of summary judgment should not be granted where such baseless allegations of corruption and incompetence have been made and the plaintiff has set forth sufficient factual allegations to demonstrate that the maker of the statements in "reckless disregard" of his awareness. Thus, I vote to modify the order of the Appellate Division by granting the motion of defendant Holt, Rinehart and Winston for summary judgment and, would otherwise affirm, thus allowing the case against defendant Newfield to proceed to trial.

* *

Order reversed, with costs, and appellants'

motions for summary judgment granted. Question certified answered in the negative. Opinion by Jasen, J. Concur:Breitel, Ch.J., Jones, Wachtler, Fuchsberg and Cooke, JJ., Breitel, Ch.J., in a concurring opinion in which Wachtler, J., also concurs, and Fuchsberg, J., in result only in a separate concurring opinion. Gabrielli, J., dissents in part and votes to modify in an opinion

Decided July 14, 1977

APPENDIX "D"

OPINION OF APPELLATE DIVISION

153 A D 20, 2d, 839

DOMINIC S. RINALDI, Respondent-Appellant, v HOLT, RINEHART & WINTON,INC. etal., Appellants and VILLAGE VOICE, INC. Respondent.-- Order, Supreme Court, New York County, entered on March 10, 1976, affirmed for the reasons stated by Gellinoff, J., at Special Term, without costs and without disbursements. Concur-Birns and Lane, JJ.: Lupiano, J., concurs in a memorandum; Murphy, J.P.,and Silverman, J.,dissent in part in separate memoranda, as follows: LUPIANO,J.(Concurring). I would affirm the order appealed from for the reasons set forth in Special Term's cogent opinion. Our Court of Appeals has declared:"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented(Di Menna & Sons v City of New York,301 NY 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v Carey, 280 App.Div.1019),or where the issue is 'arguable' (Barrett v. Jacobs,

255 NY 520,522); issue-finding, rather than issue-determination, is the key to the procedure'(Esteve v. Abad 271 App Div. 725, 727)" (Stillman v. Twentieth Century Fox Film Corp., 3 NY 2d 395,404).Further, it is well to note that "Without speculating on the apparent conflicting rationale of the post New York Times case, this court recognizes that the exercise of the right of free speech and free press demands and even mandates the observance of the coequal duty not to abuse such right, but to utilize it with right reason and dignity. Vain lip service to "duties" in a vacuous reality wherein 'rights' exist, sovereign and independent of any balancing moral or social factor, creates a semantical mockery of the very foundation of our laws and legal system." (Bavarian Motor Works v Manchester, 61 Misc 2d 309,311). Murphy, J.(dissenting in part). Defendants Holt, Rinehart & Winston, Inc. (hereafter "Holt") and Newfield appeal,separately, from that portion of the order below which denied their respective motions for summary judgment dismissing the complaint as against them in the instant libel action. Plaintiff cross-

appeals from so much of said order as granted the motion of defendant Village Voice, Inc. for similar relief. I would grant the relief requested by all three defendants. In 1972 Newfield authored and the Village Voice publiched a series of articles that may generally be described as unflattering to plaintiff, a Justice of the State Supreme Court. More particularly,the article adversely depicted the manner in which plaintiff discharged his judicial duties. Plaintiff, claiming an absence of proof of malice, took no immediate action. Subsequently, an advertising agency composed an advertisement for the Village Voice containing a summary of portions of the article, which was published in the New York Times. Plaintiff then instituted suit to recover for an invasion of his right of privacy and for defamation. This court affirmed the denial of summary judgment to the Village Voice and the agency. (Rinaldi v Village Voice, 47 AD 2d 180, cert den 423 US 883.) In the fall of 1972 Holt, with Village Voice's acquiescence, entered into a contract with Newfield to publish a book entitled

"Cruel and Unusual Justice"("the book") consisting, inter alia, of reprints of the Newfield articles. Approximately one year later Justice Rinaldi was indicted on charges of perjury and obstruction of justice. He was subsequently acquitted and re-elected to the Supreme Court.The book was published in March, 1974, while the indictment was still pending. The instant action, alleging a single claim of libel against all three defendants and seeking compensatory and punitive damages in the sum of $5,000.000, was commenced several months later. The essence of the complaint is not that any portion of the book was palpably false, but, rather, that certain allegedly material facts were omitted from otherwise accurate reports of plaintiff's conduct and disposition as a Judge generally; and his handling of three criminal cases in particular. For example, Newfield reported that three defendants in one case were set free with only $250 fines each, whereas two of them received $500 fines; the maximum sentence which could have been imposed on another defendant was only 15 years and not 25 years as report-

ed; and in the third case, the defendant was paroled on an attempted bribery charge and not on a narcotics charge as reviewed (although it appears that the bribery attempt arose out of the narcotics arrest). I find these inaccuracies, in the context of this case, to be minor and inconsequential. While it is true that Newfield editorialized and severely criticized plaintiff for, among other things, "let[ting] a heroin dealer go free", "being suspiciously lenient in felony narcotics cases," "putting people on the street who sell death for a profit" and being "incompetent and probably corrupt" the question before us is not whether these opinions are justified, but whether they are constitutionally protected. In my view, they are. The Supreme Court's landmark decision in New York Times Co. v Sullivan (376 US 254), made dramatic changes in the law of defamation involving public officials by placing on a plaintiff in that category the heavy burden of proving, with "convincing clarity," that the factual material in suit was substantially false and that it was published with knowledge of its falsity

or with reckless disregard as to its truth. On the instant record, which includes all pretrial discovery and presumably the evidence which will be adduced at the trial, plaintiff has failed to meet either aspect of that burden. As above-noted, the submissions below,sufficiently reveal that plaintiff failed to carry his constitutional burden of proof of material falsity of the published facts with "convincing clarity." Accordingly, and for that reason alone, the complaint must be dismissed. Special Term, however, found triable issues of fact, "regardless of the literal truth of the facts published",because inter alia, "crucial facts have been omitted which may devitalize the published facts and render them impotent to prove the averments". But, even assuming a case of action for libel-by-omission exists, the defenses of justification and fair comment, found still viable by Special Term, need no longer be established by defendants sued for defamation by public officials under New York Times and its progeny. "A rule compelling the critic of official conduct to guarantee the truth of all his

factual assertions--and to do so on pain of libel judgments virtually unlimited in amount***is inconsistent with the First and Fourteenth Amendments,"(New York Times Co. v Sullivan, supra, at p 279.) And if the published facts were true, certainly the editorial comments, judgments and opinions regarding plaintiff's fitness to serve as a member of the judiciary are absolutely privileged. (Gertz v. Robert Welch, Inc., 418 US 323; Miami Herald Pub. Co. v Tornillo,418 US 241.) Finally assuming arguendo that plaintiff established a defamatory falsehood, he must still establish malice because it is only on proof by the public offical plaintiff that a defamatory falsehood was uttered with"'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not" that recovery in situations such as this are allowed. (New York Times Co. v Sullivan ,supra, at p 280.) On this point, plaintiff relies on various facts which allegedly came to defendant's attention prior to publication of the book, consisting of the transcripts in the three criminal cases and letters and reports

received from several attorneys and two Bar Associations, to raise a triable issue of fact. For plaintiff to succeed, under the circumstances of this case, he must come forward with "sufficient evidence to permit the conclusion that the defendant[s] in fact entertained serious doubts as to the truth of [this] publication." (St. Amant v Thompson, 390 US 727,731.) Here, again,plaintiff has failed to present proof of malice with"convincing clarity" to warrant denial of summary judgment in a First Amendment case. The test to be applied is subjective rather than objective,based on what the defendants knew or thought at the time of publication and not on what they should have known or thought. On the record before us there is no evidence that Holt acquired knowledge of specific instances of literal or factual errors prior to publication and thus no evidence on which to base the inference that said defendant had a "high degree of awareness of their probable falsity"(Garrison v Louisiana,379 US 64, 74.)Moreover, Ms. Wood, a senior editor of Holt who was solely responsible for the prepublication edit-

ing of the book and the only person at Holt who had any significant contact with the book and its author prior to publication, submitted an affidavit below stating the reasons for her subjective belief in the truth of the Newfield charges, later bolstered by plaintiff's indictment. A jury's rejection of her sworn, uncontradicted testimony to reach the conclusion that she, in fact, entertained serious doubts as to the truth of the publication would be necessarily overturned. Even as to Newfield, who had a greater awareness of the critical comments regarding his articles than did Holt, I find that plaintiff failed to come forward with sufficient evidence under the Times rule as it has evolved and been refined,to raise a triable issue of fact regarding his subjective doubt as to the factual portions of the book at the time it was published. Before concluding, I deem it appropriate to comment (in light of our prior determination in a related case) that adherence to precedent would seemingly compel me to follow the decision in Rinaldi v Village Voice (47 AD 2d 180, supra). However,

the primary focus in that case was a commercial advertisement and plaintiff's claimed right of privacy under sections 50 and 51 of the Civil Rights Law. Additionally, this court reached the malice issue only after holding that "Freedom of the press has never been extended to commercial advertising matter (Valentine v. Chrestensen,316 US 52)." (Rinaldi v Village Voice, supra, p.182) Chrestensen no longer represents the current law in this field. (Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council,-- US--.) In light of the foregoing, the order appealed from should be modified to the extent of granting the motions of the defendants-appellants for summary judgment and otherwise affirmed. Silverman, J. (dissenting. I agree with Judge Murphy's dissent. I add only that particularly with regard to the book publisher, it is important that publishers be free to publish books presenting one side of a public controversy(provided they do not contain defamatory statements of objective facts known to the publishers to be false) without fear of running the risk of libel suits, notwithstanding

the fact that others dispute this side of the controversy and its factual basis and have even brought libel suits alleging falsity. Otherwise we run the risk that the filing of a libel suit may silence or at least "chill" discussion and publication of the opposite view.The basic point of New York Times Co. v Sullivan(376 US 254) is to liberate public discussion from most of the inhibitions that the former law of libel and libel suits had imposed. And similarly the one thing that should not be permitted to inhibit a book publisher is the pendencey of another libel suit; nor should the publisher be put to the expense and hazard of studying that suit, its legal papers, depositions and proofs and attempting to determine--at its peril-who is telling the truth.[79 Misc 2d 57.]

APPENDIX "E"

OPINION OF SUPREME COURT, SPECIAL TERM

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

DOMINIC S. RINALDI,

Plaintiff

-against-

Index No. 12477/74

HOLT, RINEHART AND WINSTON, INC., JACK NEWFIELD and THE VILLAGE VOICE, INC.,

Defendants

GELLINOFF, J.:

Defendants seek summary judgment dismissing the complaint in this action for libel. Plaintiff, a Justice of the Supreme Court of the State of New York, alleges that he was defamed in a book entitled Cruel and Unusual Justice, authored by defendant Newfield, and published by defendant Holt. The book consists essentially of reprints of articles previously written by Newfield for a newspaper, The Village Voice, published by defendant Voice, with postscripts purporting to update the information contained in the articles. Voice granted the other defendants permission to re-

publish the challenged material in the book.

After the original articles appeared in The Village Voice, Voice placed an advertisement in The New York Times, which repeated various of the allegations contained in the articles. Plaintiff then sued for libel, based on the advertisement. After completion of discovery proceedings, defendants moved for summary judgment, claiming that plaintiff - a public official-failed to show that the publication was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (New York Times Co. v Sullivan, 376 U.S. 254, 279-80 [1964]). The Appellate division of this Department affirmed the denial of summary judgment (47 A D 2d 180 [1st Dept. 1975]).

The book which is the subject of the present action was published after publication of the advertisement, the subject of the earlier action and after completion of examinations before trial in that action, but before the Appellate division's ruling.

The book, according to the blurb

on its dust jacket, is

> "about justice and why it doesn't exist in the courts and prisons of New York. It is about political bosses who use the judiciary as their own personal fiefdom. about judges who hand out probationary sentences to heroin dealers and fifeen-year terms to heroin users,and about the strange way in which Mafia bosses always seem to get favored treatment in the courts."

In several of its chapters, the book describes plaintiff by name in a derogatory manner; it labels him "incompetent and probably corrupt", and "cruel and abusive". It states that he is "suspiciously lenient in felony narcotics cases" and that, in certain specific cases, he has exhibited "kindness to big heroin dealers ".

In the motions now before the Court, each defendant asserts that no bona fide issues of fact are raised by plaintiff, either in the examinations before trial in this action, or in the papers submitted on the motions, and that each is therefore entitled to judgment dismissing the complaint. Newfield asserts that the publication sued upon is not false,

and that, even if false, plaintiff has failed to demonstrate that Newfield published it with "actual malice". Holt claims its freedom from "acutal malice", plaintiff's failure to plead and demonstrate actual damages, and plaintiff's laches in commencing this action. Voice claims that it did not publish the book and that it is protected by the "single publication" rule and by the statute of limitations.

Essentially, the statements which are the subject of this action concern three criminal proceedings over which plaintiff presided: People v. Burton; People v. Glover and People v. Vario.

People v. Burton

In the book, Newfield wrote about plaintiff's handling of the Burton case as follows:

> "Rinaldi is very tough on long-haired attorneys and black defendants, especially on questions of bail, probation, and sentencing. But his judical temper softens remarkably before heroin dealers and organized crime figures.
>
> "In August of 1972, Rinaldi released Norman Burton - a junk dealer with twelve previous arrests who was up on a charge of possession of heroin and attempted bribery of the cop who arrest-

ed him - with no bail.

(In a footnote, Newfield reported that Burton had since "fled the jurisdiction.")

"Norman Burton is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4,000 worth of junk out of the brownstone he owns at 553A Monroe Street.

"On August 8, 1972, Burton was in Court. It was his 13th arrest. His five-page yellow sheet showed convictions for selling heroin, for check forgery,and for assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting office $1,000, and it was recorded on tape.

"But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to twelve-year-olds.The judge who let Burton go without any bail was Dominic Rinaldi, a justice in Brooklyn Supreme Court.

"This was not the firsttime Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers."

The transcript of the proceedings reveals that on August 8, 1972, Norman Burton was arraigned before plaintiff on an indictment which appears to have charg-

ed him only with an attempt to bribe a police officer. Defense counsel informed the Court that defendant was then at liberty on bail on the narcotics charges from which the alleged bribery emanated, and that defendant had "always appeared on all the adjourned dates" on those charges (Transcript, p. 2). He asked that Burton be paroled in this matter. The Assistant District Attorney stated that:

"In view of the fact he is on bail on two other charges and this bribery charge emanates from those two others, we will have him available. I would recommend parole"(Transcript p. 7.)
Plaintiff then paroled Burton.

People V. Glover

After writing that plaintiff's judicial temper softens remarkably before heroin dealers and organized crime figures", Newfield says in the book that:

"In October of 1970, Rinaldi let a drug dealer named Clifton Glover plead guilty and then gave him a conditional discharge. Glover had two prior arrests for selling heroin, and he could have been sentenced to twenty-five years [Newfield now concedes that this is incorrect, and that the maximum possible sentence would have been fifteen years(Memorandum

pp. 18-19)]. According to John O'Connor, the executive director of the Hughes Committee, 'A conditional discharge for a C felony is prohibited under the state's Penal Law.'"

Additionally, Newfield writes:

"Clifton Glover is a heroin dealer on about the same scale of operations as Norman Burton - considerably above the typical street-corner addict-pusher. Glover was arrested in Brooklyn on May 20, 1970, for selling narcotics. An undercover cop made a buy and then arrested Glover.Glover had on him two ounces of heroin, almost a pound of cocaine, and a loaded gun. He had two prior arrests for selling drugs and was free on bail at the time of his arrest. Glover himself was not an addict.

"On October 28, 1970, Glover appeared before Judge Rinaldi. He pleaded guilty and received a conditional discharge - no sentence. He could have received up to twenty-five years. According to John O'Connor, the executive director of the Joint Committee on Crime, 'A conditional discharge for a C felony is prohibited under the state's penal law.' * * *

"So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. (Glover, remember, was not an addict but a businessman.) Just look at Fox Street in the South Bronx, or Myrtle Avenue in Bed-Stuy, and you can see the process of generational genocide caused by heroin. Ten-year-olds dead of ODs in abandoned buildings and alleys. Store-

keepers murdered by addicts desperate for a fix. Old junkies dead at thirty with no veins left."

The transcript of the proceedings reveals that on October 28, 1970,Clifton Glover appeared before plaintiff on an indictment charging him with selling narcotics. Defense counsel stated to the Court that, three months earlier, Glover had been sentenced in Federal Court to a term of five years' imprisonment. Counsel then, on Glovers behalf, offered to plead guilty to one count of the indictment - sale of a dangerous drug in the third degree - to cover the indictment. The assistant District Attorney stated that, "The District Attorney recommends the acceptance of that plea; and that would be 220.35 of the Penal Law, your Honor, a class C felony"(Transcript, pp. 3-4) whereupon Glover formally pleaded guilty.

In imposing sentence, plaintiff stated:

"Now, this defendant presently has been sentenced to a term of five years, and I understand the federal authorities is [sic] going to deal with him, and he will be -- I have no control of it -- sent from West Street when they know that this case is over, or any cases that he

has here are over.

* * *

"So he is going to be dealt with there for that crime. I don't feel that at this point, (1), that this defendant should be examined because of the fact that the charges in this case concerns itself [sic] with drugs, because I wouldn't even wait or think of waiting until he does his federal time and then send him to a program. I have looked at his record, and I don't believe that he is an addict anyhow. I know that in most of these cases, in this particular case, the plea has been following [sic], but nothing can be served by keeping this defendant, within the confines of the Federal Detention House, where he is now, another six or seven weeks until they get a probation report. That would not alter the sentence that I would impose; and since he is not going to a state institution, we do not have to have a probation report, in my opinion, to send to the Federal Pen. I don't think they are concerned; and if they want to find out, they certainly are thorough and can find out. So that the sentence of the Court is conditional discharge. Now we are throught with him" (Transcript, pp. 8-9).

<u>People V. Vario</u>

In the book, Newfield, following the statement that plaintiff's "judicial temper softens remarkably before heroin dealers and organized crime figures" writes:

"During the summer Rinaldi sits in

Suffolk County. In 1967 he caused a local scandal there when he permitted three prominent organized crime figures charged with bribery and conspiracy to plead guilty to misdemeanors and let them go free with only $250 fines. The district attorney thought the three (Paul Vario, James Marinacci, and Benjamin Greenfeder) should have gotten at least one year in jail."

The transcripts of the proceedings reveal that on August 11, 1967, Paul Vario, and three co-defendants, appeared before plaintiff, who was then presiding in Suffolk County. Vario, and the others, offered to plead guilty to commercial bribery, as a misdemeanor (Former Penal Law, §439), to cover the indictments against them. The Assistant District Attorney stated that:

"Under the changing rules of both the Court of Appeals and the United States Supreme Court, the People feel at this point that certain evidence would be suppressed and would no longer be available to us on the trial of this action. As a result of that we have a grave doubt that if we pressed this case to prosecution that we could successfully prosecute to the point of conviction. There is a possibility that on some minor counts we might be able to gain a conviction.

"However, in view of all this and in view of a change in status of certain witnesses of the People, we feel that

in the interest of justice we ought to dispose of this matter because of its age. It is now over four years old in justice to all parties concerned.

"we therefore, respectfully recommend the acceptance of the plea as offered.

* * *

Now, as to Paul Vario,* * *,again we have the problem of intercepted messages, wiretaps, possible suppression of certain evidence, eavesdropping. In view of all of these facts, we make the same recommendation as to the acceptance of the plea of Paul Vario"(Transcript,pp. 4-8).

Plaintiff then accepted the various pleas.

On September 8, 1967, Vario and the others appeared before plaintiff for sentence. After pleas for leniency by defense counsel, the Assistant District Attorney stated:

"It is the recommendation of the district attorney's office, your Honor, that looking back throughout the entire history of these cases, time, energy et cetra has been spent and I hearitly agree with Mr. Brenner that the trial of a criminal case is at best at times a tenuous thing which can go in either direction. We too are aware of the obstacles that now face the prosecution and with that in mind, we, of course, were ammendable to the pleas that were offered by counsel. Nevertheless, it is the position of the district attorney that in each

of these cases the Court impose a jail sentence" [Transcript, pp. 6-7]

Plaintiff then imposed on defendant Salvatore Vario a sentence of thirteen months' imprisonment, the time he had already served; on defendant Greenfeder, who had been imprisoned for some two weeks, he imposed a sentence of a fine of $500 or six months' imprisonment;on defendant Paul Vario, he imposed a sentnece of a fine of $250 or three months' imprisonment; and on defendant Marinacci, he imposed a sentence of a fine of $500 or six months' imprisonment.

Newfield's Motion

Newfield first claims that the material facts asserted by him in the book are accurate, that the rest is protected opinion, and that plaintiff is therefore barred from recovery.Newfield's affidavits on this motion, and the various memoranda submitted by defendants, emphasize that, at his examination before trial in the earlier case, plaintiff did not dispute specific statements of fact contained in the articles.

But, even assuming the literal truth of the specific factual statements [al-

though, for example, plaintiff did not put Glover "on the street" as Newfield claimed], the thrust of plaintiff's claim, as this Court understands it, is that, regardless of the literal truth of the facts published, the implication that the published facts are all the relevant material facts which prove the author's derogatory averments concerning plaintiff, when, indeed, crucial facts have been omitted which may devitalize the published facts and render them impotent to prove the averments, make the publication as a whole false. Such a claim, in this Court's view, is a sufficient foundation for a libel action [see, Abell v Cornwall Indust. Corp., 241 N.Y. 327, 332-3 (1925); Fleckenstein v. Friedman, 266 N.Y. 19 (1934); Vocation Guid. Man. v. United Newspaper Mag., 280 App. Div. 593 (1st Dept. 1952), aff'd 305 N.Y.780 (1953)].

For, a trier of fact could find that Newfield denounced plaintiff, and characterized him as "incompetent and probably corrupt", not as his naked opinion, but as the conclusion necessarily to be drawn from the specific facts stated in the book;

thus also warranting Newfield's charge that plaintiff, by "putting people on the street who sell death for a profit," is contributing to generational genocide caused by heroin. Ten-year-olds dead of ODs in abandoned buildings and alleys. Storekeepers murdered by addicts desperate for a fix. Old junkies dead at thirty with no veins left."

And the telling facts urged to support Newfield's charge are that plaintiff wrongfully released Burton without bail, gave Glover "no sentence", and permitted Vario to plead to a misdemeanor and let him go free with only a fine when the District Attorney "thought" Vario should have been sentenced to at least a year in jail. As published in the book, these facts, if they are the whole truth, are quite compelling, and lead directly to an acceptance of Newfield's charge.

However, these are facts relating to these three cases which are omitted from the book. Nowhere does Newfield mention that Burton was being arraigned solely on the bribery charge, that some other judge had already admitted him to bail on the narcotics charges, that Burton had appeared while at liberty on bail,

and, perhaps most significantly, that plaintiff placed Burton on parole at the specific recommendation of the Assistant District Attorney. Nowhere does Newfield mention that Glover had just been sentenced to five years' imprisonment prior to his plea before plaintiff, and that the District Attorney at the very least acquiesced in the discharge of Glover to federal custody. Nowhere does Newfield mention that plaintiff permitted the misdemeanor plea by Vario only after the Assistant District Attorney stated his 'grave doubt' that a conviction could be obtained at trial, and recommended that the plea be accepted.

Plaintiff contends that these omissions are crucial, that without them the picture presented by Newfield is wholly distorted, and that inclusion in the book of thse additional facts would have destroyed the assertedly false picture of plaintiff as incompetent and probably corrupt. Newfield, on the other hand, contends that the omissions are not relevant, and, in light of all the other unchallenged material concerning plaintiff published in the book, are"not sufficiently serious to warrant an editorial change" [Newfield Affidavit, pp. 4-5]. Additionally, he argues that,

> "the omission of such facts, regardless of the importance that plaintiff himself may attach to them, is well beyond the purview of an action for defamation. In my view, plaintiff's argument, if accepted, would result in the judiciary's assumption of the role of senior editor with respect to any criticism of judicial conduct" [Newfield Reply Affidavit,p.8].

Whether, in the total context of the book, the factual omissions are, as plaintiff claims, crucial, rendering the publication as a whole false, or, as Newfield claims, merely matters of editorial discretion, leaving unaffected the truth of the whole, is an issue which may not be decided as a matter of law, but must await determination by a trier of fact. For, a jury, considering the book as a whole, could conclude that the sting of Newfield's charge against plaintiff is not that plaintiff paroled Burton, or imposed no imprisonment upon Glover or Vario - which is concededly true - but that he did so as part of a pattern of suspiciously lenient treatment of large scale drug sellers and organized crime figures, and because he is "incompetent and probably corrupt" [see, Abell v Corn-

wall Indust. Corp., supra]. The transcripts of the three criminal proceedings raise a triable issue whether that charge is true.

Additionally in support of his motion, Newfield claims that there is insufficient evidence as a matter of law, of actual malice.

Plaintiff claims that prior to the publication of the book, Newfield was aware, from various reports and letters concerning his original articles about plaintiff in The Village Voice, that his statements concerning plaintiff were false, and that republication of the same articles in the book, in the face of such communications, constitutes proof of malice. But even without these reports and letters, Newfield's examination before trial in the earlier case made him aware of the contents of the transcripts of the three cases referred to. At the very least, therefore, the information in Newfield's possession before the publication of the book suffices to create an issue of fact as to his knowledge of falsity, or his reckless disregard of truth or falsity.

Accordingly, Newfield's motion for

summary judgment must be denied.

Holt's Motion

Holt, in its motion for summary judgment, also urges that insufficient evidence of falsity has been adduced to raise a bona fide factual issue. For the reasons stated above, the Court disagrees.

Holt's primary contention, however, is that, based upon the examinations before trial, and the papers submitted on this motion, it has demonstrated, as a matter of law, that in publishing the book it lacked "actual malice."

The test of "actual malice," as first stated by the Supreme Court in New York Times Co. v. Sullivan [supra, prohibits a public official from recovering for defamation relating to his official conduct unless he proves that the statement "was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not"[376 U.S. at pp.279-80]. The Supreme Court subsequently undertook to define "reckless disregard," in St.Amant v. Thompson [390 U.S. 727 (1968)] as follows:

"'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases ***. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication.* * * These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice"[390 U.S. at pp. 730 - 1].

The Court further emphasized the subjective nature of its test for reckless disregard by conceding that:

"It may be said that such a test puts a premium on ingnorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the

conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies"[390 U.S. at pp. 731-2; see also, Gertz v. Robert Welch, Inc., 418 U. S. 323, 334-5 n. 6; Trails West v Wolff, 32 N.Y. 2d 207, 219 (1972)]

It therefore is not sufficient for plaintiff to allege that Holt published with actual malice since it "never made any effort to investigate"the possibility that the publication was false [Rinaldi Affidavit, p. 15]. Plaintiff must show that Holt published when it "in fact entertained serious doubts as to the truth" of the publication

But neither is Holt entitled to judgment as a matter of law simply because the sole employee of Holt who worked on the publication, its editor, Ms. Wood, testified on examination before trial, and asserts in her affidavit, that:

"At no time during my work with Mr. Newfield on the typed manuscript did any factual statement or opinion of the author with respect to Justice Rinaldi or any of the other judges mentioned therein cause me to harbor even the slightest doubt or concern as to their truth and accuracy" [Wood Affidavit, pp. 28-9]

For, as the Supreme Court Stated in St. Amant [supra]:

"The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith [390 U.S. at p. 732.)

The issue then, is whether, upon the facts presented in the papers on this motion, a sufficient question of Holt's good faith is presented for determination by the finder of fact.

Plaintiff contends that various facts did come to Holt's attention, prior to the publication of the book, sufficient to create "serious doubts" as to the truth of Newfield's statements.

First, is a copy of the transcripts of the Burton, Glover and Vario proceedings. In its answer in this action, Holt bases part of its defense upon its"knowledge of" and "reliance on" the pleadings and examinations before trial in plaintiff's earlier action, before publishing the book [Holt's answer, pars. 15-19]. Therefore, plaintiff asserts, Holt, knowing the contents of the transcripts,which were utilized during the examinations before trial, also knew that Newfield's account of the proceedings was false. Holt

denies knowledge of the transcripts.

Second, is a letter from the President of the Brooklyn Bar Association. This letter,which Newfield and Voice rerecived after publication of the articles, but before publication of the New York Times advertisement, was the document referred to and relied upon by the Appellate Division in its denial of summary judgment in plaintiff's earlier case. The Appellate Division held that:

"The record shows that between the date of the publication of the original article and the date of the publication of the advertisement, the defendant Village Voice received information that its original publication was inaccurate, incomplete, and in many respects totally false. This information came from an apparently reliable source. Here, again, an issue is presented precluding summary judgment" [47 A D 2d at p. 182]

Holt apparently does not dispute that it had knowledge of the letter, but, instead, attacks its relevance, arguing that the letter dealt with an article by Newfield that only peripherally mentioned plaintiff.

Third, is the report of the Brooklyn Bar Association, criticizing Newfield's articles about plaintiff as "malicious, unfounded and irresponsible." Holt admits its knowledge of this report prior to

publication of the book, but asserts that, based upon the criticism of the report by Newfield, it disregarded the report.

Fourth, is the report of the Bar Association of the City of New York, critical of Newfield's statements regarding plaintiff. Holt asserts that it did not obtain a copy of that report until after the book was published.

Fifth, is a letter from an attorney employed by the Legal Aid Society, which, citing the Court records, disputes Newfield's disparaging statements about plaintiff's disposition of the Burton case. This letter was shown to Newfield at his examination before trial in the earlier case. Holt denies knowledge of the letter prior to its publication of the book.

Sixth, and finally, is a letter from an attorney practicing in Suffolk County, challenging the factual basis for Newfield's article with respect to the Vario case. This letter, too, was shown to Newfield at his examination before trial in the earlier case. Holt denies pre-publication knowledge of this letter as well.

If any or all of this material in

fact came to Holt's attention prior to its publication of the book, it is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth" of Newfield's statements about plaintiff. Some of this material concededly did come to Holt's attention. Whether the remainder did, and whether Holt's knowledge thereof does lead to the conclusion that Holt entertained serious doubts as to the truth of the publication, are issues which may not be summarily determined solely upon the papers submitted upon this motion. They require resolution by a trier of fact.

Holt's remaining claims need but brief discussion. It argues, citing Gertz v. Robert Welch,Inc. [supra], that plaintiff's failure to prove actual harm to his reputation requires dismissal of the complaint. The law, however, is otherwise, and the Gertz decision does not stand for the proposition urged by Holt. For the Supreme Court, in Gertz, had before it the issue of defamation of a private citizen, rather than a public official, and specifically limited its holding restricting recovery of presumed or puni-

tive damages to those cases "when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth" [418 U.S. at p. 349[- that is, cases other than those where, as in the instant case, "actual malice" must be proved.

Finally, Holt argues that plaintiff's failure to bring an action based upon the original articles constitutes laches barring an action based upon the subsequent book. But the book was published after plaintiff had initiated litigation following an advertisement for those articles. In that litigation plaintiff explained that he had not sued upon the articles themselves because of a lack of proof of malice at the time of their publication. Plaintiff's explained failure to sue on those articles does not constitute laches in the instant action.

Accordingly, Holt's motion for summary judgment also must be denied.

VOICE's MOTION

Voice is named as a defendant in this action because it is the copyright owner of the articles which constitute the major portion of the book and because it gave its co-defendants permission to publish

them.

The undisputed evidence as adduced at examination before trial, and as further stated in the papers submitted on this motion, demonstrate that Voice did not, as plaintiff urges in his memorandum, merely utilize Holt to publish "instead of making the new publication itself" [Memorandum, p. 27]. It appears,beyond factual dispute, that Voice merely acquiesced in Newfield's and Holt's request to republish the articles, and that it received no consideration for its permission, or profit from the publication.

Under the circumstances, the Court must hold that Voice did not publish, in any accountable sense, the book which is the subject of this action. Accordingly, its motion for summary judgment is granted.

It ought to be observed that the Court's function, in determining the motions before it, is circumscribed by the traditional rules regarding motions for summary judgment. The Court's task is "issue-finding rather than issue determination" [Falk v. Goodman, 7 N Y 2d 87, 91 (1959). So long as the proofs submitted raise real and material issues of fact, the Court may not usurp the function of

a trial Court or jury by rendering judgment summarily [see, Commercial Programming Unlimited v. Columbia Broadcasing Systems, Inc, _____A D 2d _____(1st Dept. 1975). In the instant case, such material issues of fact do exist with respect to the liability of defendants Newfield and Holt, precluding summary judgment.

Settle order.

Dated:March 1, 1976

ABRAMHAM J. GELLINOFF
J.S.C.

APPENDIX "F"

COMPLAINT IN THIS ACTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

DOMINIC S. RINALDI

Plaintiff

-against-

HOLT, RINEHART and WINSTON,INC.,JACK NEWFIELD and THE VILLAGE VOICE, INC.

Defendants

----------X

The plaintiff, for his complaint, alleges:

* * *

SIXTH: That heretofore and on or about the dates respectively set forth, the defendant THE VILLAGE VOICE, INC., published in its newspaper, VILLAGE VOICE, and circulated and distributed the following articles authored and written by the defendant JACK NEWFIELD, and titled and headed as follows: "Justice Gets a Fix " (August 31, 1972): "Judge Corso and the Mafia" (October 12, 1972); "The Politics of Justice" (November 9, 1972): "Seven Suspicious Cases" (November 30, 1972);and "The Life and Hard Times of Judge Aaron Koota" (December 28, 1972).

EIGHTH: That heretofore the defendant JACK NEWFIELD authored and wrote and in or about the month of April 1974 published a book entitled "Cruel and Unusual Justice."

NINTH: That heretofore and in and about the month of April 1974, and thereafter the defendant HOLT, RINEHART and WINSTON, INC., published and circulated and distributed and continues to publish, circulate and distribute the aforesaid book entitled "Cruel and Unusual Justice", written and authored by the defendant JACK NEWFIELD, in the State of New York and elsewhere in the United States and Canada.

TENTH: That heretofore and prior to the aforesaid publication of the book "Cruel and Unusual Justice" the defendant THE VILLAGE VOICE, Inc., as copyright owner of the aforesaid articles set forth in Paragraph SIXTH herein published in VILLAGE VOICE, did authorize and give permission to the defendant JACK NEWFIELD to make use of and reprint and publish the aforesaid articles, written by him in Village Voice, in his book, Cruel and Unusual Justice."

* * *

TWELFTH: That in the aforesaid book "Cruel and Unusual Justice" the defendants maliciously published the following <u>false and defamatory matter of and concerning the plaintiff</u>:

(a) Under the false and libelous heading "The Ten Worst Judges in New York."

Dominic Rinaldi, Brooklyn Supreme Court. Rinaldi is very tough on long-haired attorneys and black defendants, especially on questions of bail, probation and sentencing. But his judicial temper softens remarkably before heroin dealers and organized crime figures.

In August of 1972, Rinaldi released <u>Norman Burton</u> - a junk dealer with twelve previous arrests who was up on a charge of possession of heroin and attempted bribery of the cop who arrested him - with no bail. In October of 1970, Rinaldi let a drug dealer named Clifton Glover plead guilty and then gave him a conditional discharge. Glover had two prior arrests for selling heroin, and he could have been sentenced to twenty-five years. According to John O'Conner, the executive director of the Hughes Committee, "A conditional discharge for a C felony is prohibited under the state's Penal Law."During the summer Rinaldi sits in Suffolk County. In 1967 he caused a local scandal there when he permitted three prominent organized crime

figures charged with bribery and conspiracy to plead guilty to misdemeanors and let them go free with only $250 fines. The district attorney thought the three (Paul Vario, James Marinacci and Benjamin Greenfeder) should have gotten at least one year in jail.

(b) Under the false and libelous heading "Justice Gets a Fix"

"Norman Burton is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4,000 worth of junk out of the brownstone he owns at 553A Monroe Street.

On August 8, 1972, Burton was in court. It was his 13th arrest. His five-page yellow sheet showed convictions for selling heroin, for check forgery, and for assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting officer $1,000, and it was recorded on tape.

But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to twelve-year-olds. The judge who let Burton go without bail was Dominic Rinaldi, a justice in Brooklyn Supreme Court.

This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.

On June 15, 1972, at a public hearing of the Joint Legislative Committee on Crime, Rinaldi was one of the fourt city judges named publicly as being suspiciously lenient in felony narcotics cases."

"Despite Rinaldi's kindness to big heroin dealers, he has displayed little compassion when it comes to youthful offenders, bail for poor people or inmate rights. He has also been more anxious to sentence young-drug addicts to the dungeon of Rikers Island than to put them in narcotics treatment programs.

Says a wise political lawyer, 'Compared with the good Supreme Court judges in Brooklyn, compared with Thomas Jones, or Irwin Brownstein, or Abe Kalina, Rinaldi is totally insensitive to civil liberties.

"The Joint Legislative Committee on Crime, chaired by Republican State Senator John Hughes of Syracuse, has been investigating felony narcotics cases (a felony is possession of more than a pound of hard drugs) in which dealers have escaped jail sentences. The committee has a file on Judge Rinaldi.

Clifton Glover is a heroin dealer on about the same scale of operation as Norman Burton - considerably above the typical street-corner addict-pusher. Glover was arrested in Brooklyn on May 20, 1970, for selling narcotics. An undercover cop made a buy and then arrested Glover. Glover had on him two ounces of heroin, almost a pound of cocaine

and a loaded gun. He had two prior arrests for selling drugs and was free on bail at the time of his arrest. Glover himself was not an addict.

On October 28, 1970, Glover appeared before Judge Rinaldi. He pleaded guilty and received a conditional discharge - no sentence. He could have received up to twenty-five years."

"So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. (Glover, remember, was not an addict but a businessman.) Just look at Fox Street in the South Bronx, or Myrtle Avenue in Bed-Stuy, and you can see the process of generational genocide caused by heroin. Ten-year-olds dead of ODs in abandoned buildings and alleys. Storekeepers murdered by addicts desperate for a fix. Old junkies dead at thirty with no veins left."

"Norman Burton was not merely a hereoin dealer. He tried to bribe a cop, and the cop reported it and took some risk to make an additional arrest for bribery. What Billy David did was exemplary. But Judge Rinaldi abused him and let the briber go free. What effect will the example set by Judge Rinaldi have on cynical cops tempted by graft?"

"During the fall of 1972, I wrote three more articles detailing suspiciously lenient decisions by Justice Rinaldi. Two of these cases involved Mafia members Paul Vario and Sal Agro and a third involved a narcotics dealer named Clifton Glover."

"My series on Justice Rinaldi began by accident. I had spent many hot nights during the summer of 1972 riding around the 79th Precinct in Bed-Stuy with an anticrime police sergeant named Tom Santise. Santise was a good cop, and I wanted to write a piece about him. He was honest and brave, and he had an impossible job.

One night he mentioned casually that one of the plainclothes narcotics cops who worked under him had had a painful experience in court that morning. The cop, named Billy David, had arrested a heroin dealer for possesssion of drugs and for bribery. But the Judge had let the dealer walk free without any bail, and then abused and insulted the cop for being present in the courtroom at the time of arraignment.

The judge who did that was Dominic Rinaldi. I spent the next several weeks carefully analyzing records of Judge Rinaldi's previous dispositions.

Gradually, a disturbing pattern emerged. Blacks and Puerto Ricans got high bail and long sentences. Defendants connected with organized crime families were treated permissively - motions granted, misdemeanor pleas accepted, suspended sentences given, fines imposed instead of jail terms. Occasionally large-scale heroin dealers would get inexplicably lenient sentences, even conditional discharges, for Class A narcotics felonies. And certain Brooklyn lawyers would almost always win their

cases before Rinaldi.

My instincts smelled a rat. I decided to begin a personal crusade to alert the judicial, legal and political establishments to this incompetent and probably corrupt member of the judicary. I wrote four articles in the Voice and one in New York magazine detailing cases in which Judge Rinaldi had acted suspiciously and in ways that defied law and reason.

I have a theory of muckraking that says writing an article of exposure is less than half the job - creating a constituency for an idea by lobbying and writing repeated follow-up articles in crucial. The journalist, if serious, should also be an activist; that is the only way actually to affect events and institutions. Any personality or any bureaucracy, can easily survive one critical article.

So as part of my effort against Judge Rinaldi I went on several television shows, including an excellent documentary by Jeff Kamen on WNET, and on radio WBAI to spread information about the judge's indiscretions. I also spoke at several forums of lawyers, including the Brandeis Association and Brooklyn Law School, expanding on my original articles with new research."

(c) Under the heading "Judge Corso and the Mafia":

The time has finally come, I think, for the

courts to clean their own house and remove judges like Dominic Rinaldi and Joseph Corso from their positions of immense power and prestige.

There are three possible mechanisms for removing judges. One is criminal indictment, which seems remote at this point, since there is no proof money changed hands in these cases.

A second possibility is impeachment by the state legislature. This also seems unlikely.

A third way, and the most plausible, would be to hold a trial on competency grounds by a judicial court. A judicial court can be convened by the Judicial Conference, which consists of all th e administrative judges in the New York area. I believe there is now a sufficient pattern of incompetent decisions by Judges Rinaldi and Corso to justify the rare spectacle of a judicial trial."

(d) Under the heading "The Politics of Justice":

"Another measure of Rinaldi's power is that he is assigned part of the year to Suffolk County. This is a favor to Rinaldi. George Aspland, the Suffolk district attorney, has asked that Rinaldi not sit in Suffolk, but his request has been ignored. The presumption is that Rinaldi has influential friends outside the court system."

(e) Under the heading "Seven Suspicious Cases":

"Even the judge's severest critics point out

that Culkin is a kind sensative person. He is not normally cruel or abusive to defendants, the way other incompetent judges like Dominic Rinaldi or Aaron Koota are."

"Previously I reported that Brooklyn Supreme Court Justice Dominic Rinaldi gave an illegal conditional discharge(no time in jail) to a heroin dealer named Clifton Glover. "

"These are serious charges against Judge Rinaldi."

(f) Under the heading "The Life and Hard Times of Judge Aaron Koota":

"Every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia. The Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases.:

THIRTEENTH: That the aforesaid words of and concerning the plaintiff were false, scandalous and defamatory and were composed, written and published by the defendants with malice against the plaintiff and with knowledge of their falsehood and with reckless disregard of the facts with the intent and purposes of injuring the plaintiff in his reputation and in disregard of his rights.

FOURTEENTH: That by the aforesaid words of and concerning the plaintiff, the defendants meant and intended to mean that, the plaintiff was and is a corrupt, venal

biased, incompetent and unqualified justice of the Supreme Court of the State of New York who should be removed from office.

FIFTEENTH: That by reason of the publication by the defendants of the aforesaid false and defamatory statements of and concerning the plaintiff in the aforesaid book, the plaintiff has been injured and damaged in his good name, fame, integrity and reputation both as a man and in his office as a Justice of the Supreme Court and the plaintiff has suffered mental anguish and has been held up to public scorn, ridicule and contempt and has suffered loss of prestige, respect and standing as a justice of the Supreme Court in the community and elsewhere, all to his damage in the sum of Five Million ($5,000.000) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendants for compensatory and exemplary damages in the amount of Five Million ($5,000.000)Dollars together with the costs and disbursements of this action.

IRWIN N. WILPON
Attorney for Plaintiff
50 Court Street
Brooklyn, New York
212 8757410

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

DOMINIC S. RINALDI, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponents own knowledge,except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

S/S DOMINIC S.RINALDI
DOMINIC S.RINALDI

Sworn to before me
this 15th day of July, 1974

BENJAMIN RUBINOVITZ

Benjamin Rubinovitz
Notary Public State of New York
No.24-8696150 Kings County
Commission Expires March 30,1976

APPENDIX "G"

AMENDED ANSWER

HOLT,RINEHART and WINSTON

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DOMINIC S. RINALDI
Plaintiff

— against —

HOLT, RINEHART and WINSTON, Inc., JACK NEWFIELD and THE VILLAGE VOICE, INC.

Defendants

VERIFIED AMENDED ANSWER

IND.NO. 12477/74

Note of Issue Not Filed:Case on waiting List.

Defendant Holt, Rinehart and Winston, Inc., (hereinafter referred to as "Holt"), by its attorneys Coudert Brothers, as and for its amended answer to plaintiff's complaint, respectfully alleges as follows:

1. Admits the allegations of paragraphs "FIRST", "THIRD", "EIGHTH" and "NINTH" of the complaint.

2. Denies knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "SECOND"and "FOURTH of the complaint.

3. Upon information and belief, admits the allegations of paragraphs "FIFTH", "SIXTH" and "SEVENTH" of the complaint.

4. Upon information and belief, denies each and every allegation set forth in paragraph "TENTH" and "ELEVENTH" of the complaint, except admits that Holt secured from defendant The Village Voice, Inc., a license to make use of the articles referred to in paragraph "SIXTH" of the complaint in the book entitled "Cruel and Unusual Justice".

5. Denies each and every allegation set forth in paragraph "TWELFTH" of the complaint, except admits that the quotations set forth therein appeared in the book entitled "Cruel and Unusual Justice", were authored by defendant Jack Newfield and were published by Holt on or about April 15, 1974.

6. Denies each and every allegation set forth in paragraphs "THIRTEENTH", "FOURTEENTH" and "FIFTEENTH" of the complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE:

7. Upon information and belief, at all times material and relevant hereto the

plaintiff has been and is a Justice of the Supreme Court of the State of New York.

8. Upon information and belief, prior to the publication of the book entitled "Cruel and Unusual Justice", the official conduct of the plaintiff as a Justice of the Supreme Court of the State of New York was a subject of investigation and thereafter became a subject of news reports that were widely disseminated by the media throughout the City and State of New York.

9. Prior to and at the time of the publication of the book entitled "Cruel and Unusual Justice" the plaintiff was under indictment for three counts of perjury and one count of obstruction of the administration of justice in connection therewith in a prosecution instituted by the Office of the Special Prosecutor of the State of New York. The said indictment became the subject of news reports that were widely diseminated by the media throughout the City and State of New York.

10. Upon information and belief, the plaintiff was and is a candidate for re-election to the bench in the New York general election of November 5, 1974.

11. In the premises, the plaintiff was and is, at all times relevant and material hereto, a public official and public figure.

12. Upon information and belief, the defendant, Jack Newfield, the author of the statements complainted of in paragraph "TWELFTH" of the complaint herein, is and has been for a long period of time an investigative reporter and author of the highest reputation for personal honesty, integrity, thorough research and factual accuracy in reporting.

13. Defendant Holt bears no malice toward or against plaintiff and each and every statement alleged in paragraph "TWELFTH" of the complaint in this action to be defamatory of and concerning the plaintiff was published by Holt in good faith, placing reliance upon the integrity and reputation for factual accuracy of defendant Jack Newfield.

14. The book entitled "Cruel and Unusual Justice", and more particularly the statements contained therein which are complained of in paragraph "TWELFTH" of the complaint, was and were published by Holt without knowledge of falsity or seri-

ous doubts as to truth and are thus privileged under the First and Fourteenth Amendments to the constitution of the United States.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE:

15. Upon information and belief, the statements complained of in Paragraph "TWELFTH", Subparagraphs "b", "c", "d", "e" and "f" of the complaint were first published by defendant The Village Voice, Inc. in or about and during the period August 31, 1972 through December 28,1972. Upon further information and belief, the material alleged to be defamatory in paragraph "TWELFTH", subparagraph "A" of the complaint was first published by New York Magazine, on or about October 16, 1972.

16. In April, 1973 the plaintiff herein commenced an action in the Supreme Cout of the State of New York County of New York, entitled

DOMINIC S. RINALDI,

Plaintiff

-against-

THE VILLAGE VOICE,INC. and SCALI, McCABE, SLOVES, INC., Defendants.

The said action carries the Index Number 8824/1973 and was assigned for all purposes to Individual Calendar Part 15, the Honorable Justice Andrew Tyler presiding. A true and complete copy of the Summons and Amended Complaint in the said action is annexed hereto as Exhibit "A".

17. The action referred to in paragraph 16 in this answer alleges claims purporting to sound in defamation of character and violation of §51 of the New York Civil Rights Law arising out of an advertisement which appeared in The New York Times on or about February 25, 1973. A true copy of the said advertisement is annexed hereto as Exhibit "B".

18. The complaint in the action referred to in paragraphs 16 and 17 in this answer neither purports to, nor does it in fact allege any claim arising out of the statements complained of in paragraph "TWELFTH" of the complaint in this action.

19. During the period of April 1973 through April 1974, defendant Holt, with knowledge of the action described in paragraphs 16, 17 and 18 in this answer, and in full reliance on the failure or inability of the plaintiff to assert claims there-

in with regard to the statements complained of in paragraph "TWELFTH" of the complaint in this action, and in reliance upon plaintiff's sworn testimony in that action, expended great amounts of time and substantial sums of money in the pre-publication preparation, editing, typesetting, binding and printing of the book entitled "Cruel and Unusual Justice".

20. In the premises plaintiff is guilty of gross laches and is equitably estopped from recovering a judgment for money damages as against Holt on the libel claim alleged in the complaint herein.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

21. Repeats and realleges each and every allegation contained in paragraphs 7 through 15 inclusive in this answer with the same force and effect as if set forth hereinafter at length.

22. The statements complained of in paragraph "TWELFTH" of the complaint in this action had been previously published by the defendant the Village Voice,Inc. or by New York Magazine in materially identical literal and substantive form, and thus the said statements were known to

this defendant and many other persons in the City and State of New York and were believed by Holt to be subject matter of great newsworthiness and great present and future public interest and concern to the citizens of the City and State of New York.

23. Denies that plaintiff sustained any actual damage as a result of the publication of the statements complained of in paragraph "TWELFTH" of the complaint in this action.

WHEREFORE, defendant Holt, Rinehart and Winston, Inc., demands judgment dismissing the complaint with prejudice together with the costs and disbursements of this action.

Yours, etc.

COUDERT BROTHERS
Attorneys for Defendant
Holt,Rinehart and Winston, Inc.
Office and P.O.Address
200 Park Avenue
New York, N.Y. 10017
973-3300

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIAM J. TRIBE, being duly sworn, deposes and says: that he is the Senior Vice President of HOLT,RINEHART and WINSTON, CBS Educational Publishing - a Division of CBS Inc., named as one of the defendants in the Complaint in this action as "Holt, Rinehart and Winston, Inc."; that he has read and knows the contents of the foregoing Amended Answer' that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

That the reason this verification is made by deponent and not by HOLT, RINEHART and WINSTON, CBS Educational Publishing a Division of CBS Inc., is that said defendant is a division of a domestic corporation and deponent is one of the officers of said division, to wit, its Senior Vice President.

S/S WILLIAM J.TRIBE,

WILLIAM J.TRIBE,individually and as Senior Vice President of HOLT,RINEHART and WINSTON CBS Educational Publishing a Division of CBS Inc.

Sworn to before me on this 22nd day of January,1975

APPENDIX "H"

AMENDED COMPLAINT IN ACTION OF

RINALDI v. VOICE and SCALI

DOMINIC S. RINALDI

Plaintiff

-against-

THE VILLAGE VOICE,INC. and SCALI, McCABE, SLOVES,INC.

Defendants

AMENDED COMPLAINT

The plaintiff, for his amended complaint, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

* * *

EIGHTH: Upon information and belief, that heretofore the defendant, Scali, McCabe, Sloves, Inc., did compose and the defendant, The Village Voice, Inc., did approve as to content the advertisement, a copy of which is annexed hereto as Exhibit "A".

NINTH: That heretofore the defendant did insert and publish the full page advertisement in the New York Times of Sunday February 25, 1973, a copy of which is made a part hereof and is annexed hereto as

Exhibit "A".

TENTH: That the aforesaid advertisement, Exhibit "A", was paid for and composed, inserted and published by the defendants to advertise and sell the newspaper, Village Voice, and to solicit paid subscriptions thereto for the defendants' commercial and financial gain and advantage.

ELEVENTH: That in and by said advertisement, Exhibit "A", the defendants sought to gain commercial and financial advantage and to sell the aforesaid newspaper, Village Voice, and obtain paid subscriptions therefor by capitalizing on and exploiting certain false and untrue stories and articles concerning the plaintiff which were theretofore falsely and maliciously published and circulated by defendant, The Village Voice, Inc., in its aforesaid newspaper, Village Voice, and in the New York Times and New York Magazine and which stories and articles and the contents thereof are referred to and repeated by the defendants in the aforesaid advertisement, Exhibit "A", all of which said stories and articles were widely circulated and read and discussed by the public at large. Said stories and articles, insofar as they refer to the plaintiff,

are made a part hereof and annexed hereto as exhibits as follows: "Exhibit "B" - Village Voice of August 31, 1972; Exhibit "C" - Village Voice of October 12, 1972; Exhibit "D" - Village Voice of November 9, 1972; Exhibit "E" - Village Voice of November 30, 1972; Exhibit "F" - New York Magazine of October 16, 1972; Exhibit "G" New York Times of September 25, 1972.

* * *

THIRTEENTH: That the matter set forth as to the plaintiff in the aforesaid advertisement, Exhibit "A", was false, scandalous and defamatory and was composed and published by the defendants with malice against the plaintiff and with reckless disregard of the facts with the intent and purpose of injuring the plaintiff in his reputation and in disregard of his rights in order for the purpose of business and trade to serve and advance the commercial and financial interest of the defendants and to increase the sale and circulation of the aforesaid newspaper, Village Voice, and to obtain paid subscriptions to the aforesaid newspaper.

FOURTEENTH: That by reason of the publication by the defendants of the afore-

said advertisement, Exhibit "A", the plaintiff has been injured and damaged in his good name, fame, integrity and reputation, both as a man and in his office as a justice of the Supreme Court, and plaintiff has suffered mental anguish and has been held up to public scorn, ridicule and contempt and has suffered loss of prestige, respect and standing as a justice of the Supreme Court in the community and elsewhere, all to his damage in the sum of Three Million ($3,000,000) Dollars.

* * *

WHEREFORE, the plaintiff demands judgment against the defendants for compensatory and exemplary damages in the amount of Six Million ($6,000,000)Dollars, together with the costs and disbursements of this action.

IRWIN N. WILPON
Attorney for Plaintiff
Office & P.O.Address
50 Court Street
Brooklyn, N.Y.11201
212 875-7480

ADVERTISEMENT IN NEW YORK TIMES
FEBRUARY 25, 1973

EXHIBIT "A" OF COMPLAINT

THE JUDGE BAWLED OUT THE COP AND LET THE PUSHER GO FREE.

The pusher's crimes against society are widely known.

But the judge's activities against society aren't.

The facts are alarming

That's why the Village Voice decided to bring them before the public

We broke Jack Newfield's story in August, several weeks before any other publication.

A Heroin pusher with a record of 18 arrests and assorted convictions was charged with selling heroin and attempting to bribe a police officer.

Justice Rinaldi of the Brooklyn Supreme Court released him without bail.

But even stranger than Rinaldi's handling of the pusher was his handling of the cop who arrested the pusher.

Rinaldi yelled at and humiliated the cop...in effect abusing the supposed bribee while allowing the supposed briber to go free.

Strange behavior for a man supposed to be meting out justice?

It gets stranger.Justice Rinaldi has a whole record of curious behavior,as the New York Times and New York Magazine reported in their studies several weeks later.

Curiously lenient with heroin dealers and orgainized crime figures. Very tough on long-haired attorneys, black defendants, on questions like bail, probation and sentencing.

Obviously Rinaldi is not the only questionable judge in New York. Our Judicial system could be riddled with them.

These are several ways to elimate such judges, First of course, by voting them out of office. Then through criminal indictment and trial, impeachment by the State Legislature or trial on competency by a judical court.

And the only way any of those can happen is if people start causing an uproar.

We applaud the New York Time study. But we're even prouder that The Village Voice spoke out first.

In fact, that why our readers read the Voice.

* * *

February 25, 1973

VOICE ARTICLE OF AUGUST 31,1972

EXHIBIT "B" OF COMPLAINT

THE VILLAGE VOICE 20¢

BROOKLYN'S JUDGE RINALDI

JUSTICE GETS A FIX

BY JACK NEWFIELD

Norman Burton is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4,000 worth of junk out of a brownstone he owns at 553A Monroe Street.

Three weeks ago, on August 8,1972, Burton was in court. It was his 13th arrest. His five-page yellow sheet showed convictions for selling heroin, for check forgery, and for assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting officer $1,000 and it was recorded on tape.

But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to 12-year-olds. The judge who let Burton go without any bail was Dominic Rinaldi, a justice in Brooklyn Supreme Court.

This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.

On June 15 of this year, at a public hearing of the Joint Legislative Committee on Crime Rinaldi was one of four city judges named publicly as being suspiciously lenient in felony narcotics cases.

Dominic Rinaldi is a loyal part of the Brooklyn political machine. He is especially close to James Mangano, who is a district leader and the chief clerk of Brooklyn Supreme Court, and who for 20 years has been a great conservative power in borough politics. His son Guy Mangano, is also a Brooklyn Supreme Court Judge.

Despite his kindness to big heroin dealers, Rinaldi has displayed little compassion when it comes to youthful offenders, bail for poor people or inmate rights. He has also been more anxious to sentence young drug addicts to the dungeon of Rikers Island than to put them in narcotics programs.

Says a wise political lawyer "Compared with the good Supreme Court Judges in Brooklyn, compared with Thomas Jones, or Irwin Brownstein, or Abe Kalina, Rinaldi is totally insensitive to civil liberties."

Last Saturday Billy David asked about the Burton Case in Bed-Stuy's old run-down 79th Precinct, at the corner of Gates and Throop. David is a black plainclothes anti-crime cop, specializing in narcotics. He made the arrest of Burton.

"We were trying to get Norman for a month. I had arrested him once before as he was selling a $5 bag to a 12-year-old boy. Once we staked out his house and watched 75 people buy drugs from him in two hours. I watched college girls drive up in VW's and buy heroin from him. Any-

way, the first time we arrested him, he was given only $1500 bail, and he had that much cash on him.

"It was hard to bust Norman because he almost never leaves his house, and we knew he carried a gun. We finally got him as he was bringing back 25 decks of heroin from his supplier...

"A few days later, I received word that Norman wanted to see me and make a deal. I reported this to the Police Department's internal affairs division, and they had me wear a wire (concealed tape recorder) when I met with Norman.

"When I saw him, Norman offered me $1000 to drop the case by not showing up in court. At that point I arrested him for bribery."

Norman Burton's arraignment was on August 8, 1972, in Brooklyn. Billy David decided to go to the hearing because he was curious how Norman managed to get such low bail the last time.

In the middle of the hearing,Judge Rinaldi was told by Norman's lawyer that David was in the courtroom and Rinaldi ordered David to the bench.

"The judge started to yell at me", David recalls. "He asked me what was I doing there, and then he asked me three times what bail should be set for Norman. I felt humiliated. I felt that I was nothing. The judge was yelling at me and Norman was watching, and other defendants were watching. I couldn't even talk I felt so bad. Then Judge Rinaldi let Norman off with no bail. He paroled him in his own custody. I will never forget the tone of contempt in Rinaldi's voice as he was yelling at me. The other guy was selling heroin to

children and I was being treated as the criminal."

David's commanding officer, Sergeant Tom Santise, was outraged when he learned what happened in court. He filed an immediate complaint with Inspector Eli Lazarus of the Criminal Justice Bureau. He also called the Brooklyn D.A.'s office to express his dismay. The D.A's office reassured Santise there was nothing improper about David's presence in the courtroom at the arraignment.

The Joint Legislative Committe on Crime, chaired by Republican State Senator John Hughes of Syracuse, has been investigating felony narcotics cases (a felony is possession of more than a pound of hard drugs) in which dealers have escaped jail sentences. The committee has a file on Judge Rinaldi.

Clifton Glover is a heroin dealer on about the same scale of operation as Norman Burton- considerably above the typical street-corner addict-pusher. Glover was arrested in Brooklyn on May 20,1970, for selling narcotics.An undercover cop made a buy and then arrested Glover.Glover had on him two ounces of heroin, almost a pound of cocaine, and a loaded gun. He had two prior arrests for selling drugs and was free on bail at the time of his arrest.

On October 28, 1970, Clifton appeared before Judge Rinaldi. He pleaded guilty and received a conditional discharge - no sentence. He could have received 25 years. According to John O'Conner, the executive director of the Joint Committee on Crime, "a conditional discharge for a C felony is prohibited under the state's penal law."

In December 1971, the Joint Committee released a study of court dispositions of felony narcotics cases. The study revealed that in Brooklyn only six per cent of major narcotics dealers are sentenced to a year or more in prison. This compares with 31 per cent in the Bronx, and 28 per cent in Queens. The same survey disclosed that 42 per cent of felony narcotics cases in Brooklyn were dismissed, compared with only 15 per cent in the Bronx.

Two related poisons are eating away at New York - the plague of heroin, and the corruption of the criminal justice system caused by the billion dollar economy of junk. After reading the Joint Crime Committee's studies, and the State Commission of Investigation's annual report released two weeks ago, it seems clear that the most dangerous corrupters of justice in this town are not the cops on the beat, but those who are more powerful and respectable--the judges and the prosecutors.

The State Commission's report devoted 32 pages to describing how the Queens District Attorney's office and Judge Albert Bosch let a heroin dealer plead guilty to a misdemeanor and go free.

Heroin Kills. It causes crime, it destroys neighborhoods, it makes citizens flee to the suburbs or live in fear behind triple locks. A child a week dies in this city because of the negligence of drug-addicted parents. Eighty per cent of the inmates in the over-crowded Tombs are junkies. More than half of the 58 homicides during the week of July 14 involved heroin. The economy of junk is what organized crime is all about. And the immense profits of heroin corrupt the rule of law itself.

There are at least 250,000 heroin addicts in New York City. Nobody knows for sure exactly how many rats are in the slums. It is estimated by Max Singer of the Hudson Institute that in New York State addicts steal a half billion dollars annually to maintain their habits.

So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. Just look at Fox Street in the South Bronx or Myrtle Avenue in Bed-Stuy, and you can see the process of generational genocide caused by heroin. Ten-year-olds dead of OD's in abandoned buildings and alleys. Storekeepers murdered by addicts desperate for a fix. Old junkies dead at 30 with no veins left.

Thanks to David Durk, Frank Serpico, David Burnham and the Knapp Commission, police corruption has been exposed to public scrutiny. Norman Burton was not just a heroin dealer. He tried to bribe a cop, and the cop reported it and took some risk to make an additional arrest for bribery. What Billy David did was exemplary. But Judge Rinaldi abused him and let the briber go free. What effect will the example set by Judge Rinaldi have on cynical cops tempted by graft?

Billy David is not affluent. He lives in Canarsie and probably earns less money than most readers of the Voice. Norman Burton, the dealer probably makes $100,000 A year; he owns two houses. Billy David isn't responsible for the poverty and violence of Bedford-Stuyvesant. He didn't build the rotten housing or cause the unemployment, or bring in all the narcotics and knives, or spread the veneral diseases, or breed the rats. He didn't build Bedford-

Stuyvesant; the banks, and the real estate speculators, and the politicians did that. Billy David just goes out every night and tries to protect people from muggers and robbers, and tries to lock up the heroin dealers.

Unlike most of us, he gets to see the victims--the pain of a mother whose son is strung out on junk, the old person killed for $2, a welfare recipient whose check has been stolen, the OD's still in public schools. And in the 79th Precinct all of the victims are black.

Nobody judges the judges. A Supreme Court Justice like Dominic Rinaldi is literally beyond the law. He is a king without accountability. As long as he pleases James Mangano, he will remain a judge. And you and I will have to stand in respect every time he enters and leaves his courtroom.

VOICE ARTICLE OF OCTOBER 12, 1972

EXHIBIT "C" OF COMPLAINT

THE VILLAGE VOICE 20¢

JUDGE CORSO & THE MAFIA

INDICTING THE COURTS

* * *

Dominic Rinaldi is another Brooklyn Supreme Court Judge with a twisted sense of justice. Six weeks ago I wrote a Voice article describing two cases involving heroin dealers where Judge Rinaldi let them go free without a jail sentence ("Justice Gets a Fix,"Voice; August 31). One dealer had 12 previous arrests and was arrested selling to a 12-year-old. The second drug pusher could have gotten 25 years on a C felony, and Judge Rinaldi gave him a conditional discharge.

Two weeks ago in the New York Times Nicholas Gage reported two other cases where Judge Rinaldi was suspiciously lenient with members of the Mafia. One of those involved, Paul Vario, a captain in the Mafia family headed by Thomas Luchese. Vario had a criminal record dating back to 1925, including a conviction for rape. He was charged with bribery and conspiracy and could have gotten 15 years in jail. But Judge Rinaldi only fined him $250.

The other case reported by the Times involved Sal Agro, a Mafioso who was indicted for grand larceny and forgery. Agro pleaded guilty and was given a suspended sentence.

Judge Rinaldi justified his leniency with Agro on the grounds that the

defendant did not have a previous record. But, in fact, Agro did have a previous criminal record. On March 6, 1953, Agro was sentenced to a year in prison for his role in a heroin-selling conspiracy.

My investigation has now disclosed a fifth case where Rinaldi's judgment is in serious question. This case like the two Mafia cases, took place in Suffolk County, where Rinaldi sits six months a year, even though he was elected in Brooklyn.

Richard DiNapoli, a former assemblyman was the Recreation Commissioner for the town of Babylon, when he was indicted for grand larceny of political funds. He won several adjournments, and finally arranged for a non-jury trial before Judge Rinaldi in October, 1970. Rinaldi acquited DiNapoli.

Last week an assistant Suffolk County district attorney talked (not for attribution about Judge Rinaldi:

"The Vario and Agro cases still stink. And we still believe Rinaldi's not guilty decision in the DiNapoli case was bad. We did not follow Judge Rinaldi's logic. We had a good strong case against DiNapoli . . . A lot of mob guys just stall their cases and wait for Rinaldi to come out here in June, and then he goes easy on them. We wish he would stay in Brooklyn. He comes out here and does things no local judge would dare do. It's a bad situation, but we can't do anyting about it.

Judge Rinaldi gets paid $50 a day extra-above his $41,000 salary-by the taxpayers to sit in Suffolk County, when the assignment is actually a favor to him because of a home he owns

near Islip.

Judge Rinaldi is up for re-election in 1974.

* * *

The time has finally come, I think, for the courts to clean their own house, and remove judges like Dominic Rinaldi and Joseph Corso from their positions of immense power and prestige.

There are three possible mechanisms for removing judges. One is criminal indictment, which seems remote at this point, since there is no proof money changed hands in these cases.

A second possible removal mechanism is impeachment by the state legislature. This also seems unlikely.

A third way, and the most plausible, would be a trial on competency grounds by a judicial court. A judicial court can be convened by the Judicial Conference which consists of all the Administrative Judges in the New York area. A judicial trial has been scheduled for Manhattan Supreme Court Justice Mitchell Schweitzer when Schweitzer resigned last year.

I believe there is now a sufficient pattern of incompetent decisions by Judges Rinaldi and Corso to justify the rare spectacle of a judicial trial.

VOICE ARTICLE OF NOVEMBER 9, 1972

EXHIBIT "D" OF COMPLAINT

THE VILLAGE VOICE 20¢

THE POLITICS OF JUSTICE

* * *

Brooklyn Supreme Court Justice Dominic Rinaldi is a typical machine judge. And as I have written in these pages before, Rinaldi has been simultaneously repressive toward blacks and permissive with heroin dealers and members of the Mafia.

On September 8, 1967,Paul Vario pleaded guilty before Judge Rinaldi to bribery of a policeman. Vario had a long criminal record including a conviction for rape. Judge Rinaldi could have given him five years in jail. Instead he fined him $250. Four weeks ago, Paul Vario turned out to be the owner of the Brooklyn junkyard trailer that was the headquarters for the five organized crime families of New York City.

At a public hearing of the Joint Legislative Committee on Crime last June 15, Judge Rinaldi was one of the four judges named as being lenient with heroin dealers.

On October 28, 1970, Rinaldi had the case of Clifton Glover, a heroin dealer with two previous arrests for selling junk. Rinaldi could have given Glover 25 years. Instead he gave Glover a conditional discharge - no time in

jail.

Rinaldi is also one of the most powerful judges in Brooklyn. He was first appointed to the bench by John Sharkey in 1960, and since then,both Anthony Travia and Meade Esposito have been helpful to him. In 1965, Esposito arranged for Rinaldi's appointment to the Temporary Study Commission on the Courts, a prestige prize many fine judges wanted.

Another measure of Rinaldi's power is that he is assigned most of the year to Suffolk County. This is a favor to Rinaldi because he has a home in Islip, and gets paid $50 a day extra for sitting outside of Brooklyn. George Aspland, the Suffolk District Attorney, has asked that Rinaldi not sit in Suffolk,but the D.A.'s request has been ignored. The presumption is that Rinaldi has influential friends outside the court system.

Judge Rinaldi is up for re-election in 1974 in Brooklyn.

* * *

VOICE ARTICLE OF NOVEMBER 30,1972

EXHIBIT "E" OF COMPLAINT

SEVEN SUSPICIOUS CASES

* * *

Even the judge's severest critics point out that Culkin is a kind, sensitive individual. He is not normally cruel or abusive to defendants, the way other incompetent judges like Dominic Rinaldi or Aaron Koota are.

* * *

Previously in these pages, I reported that Brooklyn Supreme Court Justice Dominic Rinaldi gave an illegal conditional discharge to a heroin dealer named Clifton Glover.

I will repeat the details so that Presiding Justice Rabin cannot miss them.

On May 20, 1970, Brooklyn police arrested Glover for selling heroin.Glover had a loaded 32 caliber revolver on him. Glover's record showed a previous conviction for bank larceny, and two previous arrests for assault and robbery. On June 18, 1970, he was again arrested for selling heroin in Brooklyn.

On October 28, 1970, Glover pleaded guilty before Judge Rinaldi to a C Felony(punishable by up to 15 years) for both the May 20 and June 18 heroin arrests. And Judge Rinaldi then gave Glover a conditional discharge - no time in jail.

This was illegal. Section 65.01 (1) of the Penal Law prohibits the imposition of the sentence of a conditional discharge for any narcotics felony.

Also according to the Police Department and the District Attorney, Glover provided no information on higher-ups in the heroin traffic to possibly justify the extraordinary leniency granted him.

* * *

These are serious charges against Judges DiLorenzo, Rinaldi and Corso. I believe if they were being made about a cop, or a sanitation worker, there would have been an immediate investigation by those in authority. But Presiding Justice Rabin, who is responsible for discipline and supervision of the Brooklyn courts seems indifferent.

* * *

NEW YORK MAGAZINE ARTICLE OF OCTOBER 16, 1972

EXHIBIT "F" OF COMPLAINT

THE TEN WORST JUDGES IN NEW YORK

BY JACK NEWFIELD

* * *

Dominic Rinaldi, Brooklyn Supreme Court. Rinaldi is very tough on long-haired attorneys and black defendants on questions like bail, probation and sentencing. But his judicial temper softens remarkably before heroin dealers and organized-crime figures.

IN August of this year Rinaldi had the case of Norman Burton, a junk dealer with twelve previous arrests. He was arrested on a charge of possession of heroin. He was also charged with trying to bribe the cop who arrested him. Justice Rinaldi released Burton with no bail. In October of 1970 Rinaldi had another drug dealer before him named Clifton Glover. Glover had two prior arrests for selling heroin, and he could have gotten 25 years. Rinaldi let Glover plead guilty and gave him a conditional discharge-no time in jail on the narcotics charge. According to John O'Connor, the executive director of the Hughes Committee:"A conditional discharge for a C Felony is prohibited under the state's penal law."

During the summer Rinaldi sits in Suffolk County. In 1967 he caused a local scandal when he permitted three prominent organized crime figures charged with bribery and conspiracy to plead

guilty to misdemeanors, and let them go free with only $500 fines. The District Attorney thought the three (Sal Vario, James Marinacci and Benjamin Greenfeder) should have gotten at least ten years in jail.

* * *

NEW YORK TIMES ARTICLE OF SEPTEMBER 25,1972

EXHIBIT"G" OF COMPLAINT

STUDY SHOWS COURTS LENIENT WITH MAFIOSI

Racketeers Found 5 Times Less Likely To Be Convicted in State Than Others

By Nicholas Gage

On Sept. 8, 1967, Paul Vario, who is listed by the Justice Department as a captain in the Mafia family of the late Thomas Luchese, pleaded guilty before Supreme Court Justice Dominic S. Rinaldi to commercial bribery of a police officer.

Vario, whose criminal record dates back to 1925 and includes a conviction for rape, could have been given up to a year in jail. Instead, Judge Rinaldi fined him $250.

On the same day Justice Rinaldi sentenced Luis Guzman, 19 years old, up to five years at Elmira Reformatory for robbing a drugstore in Huntington, L.I.

Vario is not the only Mafioso who has fared better than ordinary defendants in New York State courts.

1,762 Cases Studied

Last year the State Joint Legislative Committee on Crime conducted a study of 1,762 cases in state courts in the years 1960 through 1969 involving organized crime figures, including Vario.

The committee, whose chairman is Senator John H. Hughes of Syracuse, found that the rate of dismissals and acquittals for racketeers was five times that of other defendants.

In New York City, 44.7 per cent of indictments against members of organized crime were dismissed by Supreme Court judges during the 10-year period. Only 11.5 per cent of indictments against all defendants were dismissed, according to the study.

In 193 instances where organized crime figures were actually convicted, the study showed that judges let the defendants off with suspended sentences or fines in 46 per cent of the cases.

A Swindle in Brooklyn

In order to determine some of the factors in the wide discrepancy between the treatment of racketeers and ordinary defendants in the courts, The New York Times during the last six weeks has investigated the handling of several of these cases as well as more recent ones that have come before state courts in the metropolitan area.

One case in which an organized crime figure fared well in court involved an imaginative swindle that netted over $1-million during a six-week period in 1963. Counterfeit checks of Mays Department Store in Brooklyn were made out to fictional suppliers of Mays at banks where swindlers had previously established accounts for the bogus suppliers.

Seven persons were indicted in the swindle on charges of grand larceny and forgery. One of the seven, Salvatore Agro, was connected to the Mafia. According to informa-

tion from investigations of the principals involved in the swindle, the person who devised the scheme, Herman Witt, borrowed $30,000 from a Mafia lieutenant to start the bank accounts used to cash the counterfeit Mays checks, and Agro was assigned to look after the investment.

In 1966, all seven defendants pleaded guilty to lesser charges before Justice Rinaldi, the same judge who had fined Vario, and he sentenced six of them to prison terms. Agro, the reputed Mafioso, was given a suspended sentence by Judge Rinaldi and walked out of the courtroom a free man.

In a telephone interview last week, Justice Rinaldi, who has been on the Supreme Court, Second District, since 1962, was asked about the sentencing of both Agro and Vario.

He said he could not remember the Vario case at all, which came before him while he was sitting in Suffolk County rather than in Brooklyn, his regular assignment. "I must have handled 200 cases for them out there that year," he said. "I don't remember any of them."

Agro Case Remembered

The judge said he did remember the Agro case. "There were several defendants in that one and I gave all of them but Agro time," he said. "His charge was reduced to a misdemeanor, which the prosecution went along with, and the probation report showed no previous record for him."

The assistant district attorney in charge of the case, Edward Panzarella, apparently concurred with the judge's decision. He later signed a report saying that the pleas "in each instance are recommended and the sentence will in all respects be adequate."

He said in the report that Agro was "the least culpable" of the defendants. "Salvatore Agro is 38 years old and has no prior record," Mr. Panzarella wrote.

However, during the police investigation of the case, detectives taped conversations between Witt, who devised the swindle, and Agro. In those tapes, which were made available to Mr. Panzarella, Agro stated that he was fully involved in the swindle and that he was close to leading Mafiosi in New York.

"First of all, the people, the big people in New York, knew about this score, the Mays score...." Agro told Witt in one of the tapes "They financed—gave me the money—for this [obscenity] thing."

Moreover, The Times discovered in the course of its investigation that, contrary to what Mr. Panzarella said in his report, Agro did have a previous record.

The files of the Federal courthouse in Buffalo show that on March 6, 1953, Agro pleaded guilty to conspiracy to deal in narcotics and received a year's sentence.

Mr. Panzarella is no longer with the Brooklyn District Attorney's office. He resigned after it was disclosed that he had failed to prosecute a city correction officer arrested with more than $200,000 worth of cocaine. He could not be reached for comment.

The Agro case illustrates that in some instances lenient treatment given organized-crime fighters by a judge is approved by the prosecutor involved. But even when the prosecutor resists such treatment, racketeers can wind up doing very well in the courts.

• • •

APPENDIX I
PHOTOCOPY OF HEADLINE FROM BOOK

Justice Gets a Fix

NORMAN BURTON is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4,000 worth of junk out of the brownstone he owns at 553A Monroe Street.

On August 8, 1972, Burton was in court. It was his 13th arrest. His five-page yellow sheet showed convictions for selling heroin, for check forgery, and for assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting officer $1,000, and it was recorded on tape.

But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to twelve-year-olds. The judge who let Burton go without any bail was Dominic Rinaldi, a justice in Brooklyn Supreme Court.

This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.

APPENDIX J
COURT MINUTES PEOPLE V.BURTON
AUGUST 8,1972

* * * *

THE CLERK: Do you waive the reading of the indictment:

MR. ANTIOCO: Yes.

THE CLERK: How does the defendant plead?

MR. ANTIOCO: Not guilty.

I would ask the Court to parole the defendant on the charge. The defendant has two cases pending, one here in this Court and one in the Criminal Court.The defendant is out on $3,000 bail, which he posted, and he has always appeared on all the adjourned dates.

The case arose out of the other two cases now pending. The defendant has always appeared and never was there a bench warrant issued. He has an extensive record, sir, and whatever penalties are meted out he is willing to accept.

MR. SILVERMAN: I have none of the facts here. I could not begin to assess the case.

THE COURT: This is a bribery of whom?

MR. ANTIOCO: Of the police officer who arrested him.

THE COURT: What was he arrested for?

MR. ANTIOCO: Two drug cases.

THE COURT: He's better off if he stays in, at least, sir, until we have a conference. I am setting it down for conference next week. This will keep him out of trouble.

MR. ANTIOCO: What happened is he went to the District Attorney to complain about the alleged bribery. He alleges that the police officer wanted to accept money. He went to the District Attorney's office and turned out that the officer arrested him for bribery after. The officer is present in Court.

THE COURT: Oh, is he here?

MR. ANTIOCO: Yes.

THE COURT: Please step up here.

MR. SILVERMAN: If he has been arraigned on other charges--

THE COURT: Are you the officer in this case?

A VOICE: Yes.

THE COURT: Please state your name?

A VOICE: Patrolman Billy Davis.

THE COURT: Are you on the Narcotics Squad?

MR. DAVIS: The 79th Anti-Narcotics.

THE COURT: Did you arrest the defendant and charge him with a crime involving our narcotic law?

MR. DAVIS: Yes, I did, and also a weapon. The first charge was a weapon.

THE COURT: Is he out on bail on each of those?

MR. DAVIS: Yes.

THE COURT: Are you--well, what are you doing here today?

MR. DAVIS: I called to find out if he was being arraigned.

THE COURT: What is it your business when he is going to be arraigned?

MR. DAVIS: I locked him up.

THE COURT: Do you see any other cops in here?

MR. DAVIS: I wasn't looking for any other cops, your Honor.

THE COURT: I ask you now, do you see any other cops in here?

what is your interest here? were you notified by the District Attorney to come here?

MR. DAVIS: No, I wasn't.

THE COURT: What is your interests in his arraignment? He is out on bail on the other two cases;is that right?

MR. DAVIS: Yes, he is.

THE COURT: What do you think I ought to do in this case?

MR. DAVIS: I don't know.

THE COURT: Well, you put your nose in here and I am going to find out what you are doing here.

How much bail do you think I ought to fix?

MR. DAVIS: I have no idea.

THE COURT: Are you working or are you on vacation?

MR. DAVIS: No, I was over in 120 Schermerhorn Street and I had another case here. I came here to check it out.

THE COURT: So you came here to check it out?

MR. DAVIS: Yes. I didn't know I wasn't supposed to come here.

THE COURT: How long have you been a cop?

MR. DAVIS: Three and a half years.

THE COURT: Do you go to ever arraignment of every defendant you arrest?

MR. DAVIS: Everyone.

THE COURT: You might get in trouble with one of these cases, you know,because if he is paroled and you walk over to him and talk to him they might decide that

you are looking to shake him down and they will start to holler even if it isn't true and you will have yourself in a lot of trouble.

You ought to stay away from these arraignments.

MR. DAVIS: This is the first time.

THE COURT: When the District Attorney wants you he will send for you. You work for the Police Department and your duty is if you see anything that warrants an arrest, you are supposed to make an arrest. From there on, whenever the District Attorney tells you he wants you you are supposed to be present. You have no business in here particularly in this case.

I am going to parole the defendant.

MR. SILVERMAN: I don't know the man. I never saw him and I had no idea he was here.

THE COURT: And I know you already recommended parole.

MR. SILVERMAN: In view of the fact he is on bail on two other charges and this bribery charge emanates from those two others, we will have him available.

I would recommend parole.

THE COURT: Do you know when the

other cases have been conferenced?

MR. ANTIOCO: No. One is still pending in the Criminal Court and one is up here. He was arraigned on that other charge before JudgeGittleson and just mark it off the calendar until we get a date before conference.

THE COURT: I will give you a date for conference on this one. If the other one comes up for conference before this, let me know. I will make this August 21, and we will put them all together.

You better make that August 24,1972 in Part 1AA.

I suggest that you stay in touch with the District Attorney to see that the cases are staying together.

THE CLERK: Mr. Burton, you are placed on parole and you are advised that if you fail to return you will face an additional charge of parole jumping.

APPENDIX K

AFFIDAVIT OF ASSISTANT DISTRICT ATTORNEY NORMAN SILVERMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

DOMINIC S. RINALDI,

Plaintiff

-against-

THE VILLAGE VOICE, INC., and SCALI,McCABE,SLOVES, INC.,

Defendants

----------X

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

NORMAN SILVERMAN, being duly sworn, deposes and says:

I am an assistant district attorney of Kings County, New York. I was such an assistant District Attorney on August 8, 1972.

On August 8, 1972, I was assigned to and in charge of the arraignment part of the Supreme Court, Kings County which was on that date presided over by Justice Dominic S. Rinaldi.

The arraignment calendar is prepared by the Clerk. On the calendar for August 8, 1972 there appeared for arraign-

ment the case of People of the State of New York against Norman Burton, Indictment No. 7715-1972 which was an indictment for bribery. At that time the defendant was already out on bail of $3000 on two other charges related to the alleged bribery.

At that time, August 8, 1972, it was my usual practice where a defendant was already out on bail furnished him on another charge, to consent to parole him on the additional charge. Pursuant to such practice, I consented to the parole of the defendant,Norman Burton, on the bribery charge on August 8,1972.

I was not aware at any time prior to the arraignment on August 8, 1972 that a police officer concerned with the matter would be or was in Court. I at no time requested him to be present at the arraignment.

Sworn to before me this
18th day of November,1974. s/s NORMAN SILVERMAN
NORMAN SILVERMAN

BENJAMIN RUBINOVITZ
Notary Public State of New York
#24-8696150 Qual in Kings County
Certification Expires March 30,1976

APPENDIX L

COURT MINUTES PEOPLE V GLOVER

OCTOBER 28, 1970

THE COURT: At this point we are talking about Clifton Glover, indictment No. 2621 of 1970.

Now,I want a representation by counsel, (1), that you represented this man, (2), that you represent him now and that you represented him on July 9th, and that since--And you know of your own knowledge and the defendant has already indicated, but I will have him indicate -- that no notice of appeal has been filed in that particular case, and that as far as we know he is not going to appeal because his 30 days are up. So he couldn't appeal now, any more. Will you make that representation?

MR. PELCYGER: If your Honor pleases, I represented the defendant in the Eastern Federal District, in the Federal Court, and a robbery was pending against him there; and June 5,1970, he took a plea before Judge Abbott to the indictment; and July 9th, Judge Abbott sentenced this defendant to the custody of the Attorney General for a period of five years. No appeal has been filed on his

behalf; no appeal is expected to be filed. His time to file any notice of appeal has expired some time ago. I represented him there and I represent him in the present case no, your Honor.

THE COURT: Make your application in this present case.

MR. BARRA: Would you give me the docket numbers. I have the docket numbers on the June case, but the docket numbers on the May 20th case I am going to cover. That would be the possession and the gun case.

THE COURT: This is the May 20th case.

MR. BARRA: I have the docket numbers on the two June cases. These are the two May cases.

THE COURT: Go ahead.

MR. PELCYGER: If the Court please, the defendant Clifton Glover, at this time, under indictment No. 2621 of 1970, offers to withdraw his plea of not guilty and offers to plead guilty to the first count of the indictment to cover the complete indictment; and that is sale of a dangerous drug in the third degree.

MR. BARRA: The District Attorney recommends the acceptance of that plea;

and that would be 220.35 of the Penal Law, your Honor, a class C felony.

THE COURT: And that is to cover--

MR. BARRA: The entire indictment, and that is the sale--It is the sale; and it is to cover the entire indictment here; and also, your Honor, with the understanding that it will cover four criminal court cases which are now pending, and those are under docket No. A7989 of '70, A7990 of '70, originating out of an arrest on 4-20-70; and two other cases, docket No. A9687 of '70 and A9683 of '70, originating out of an arrest on June 19,1970. And with respect to the last two cases, 9687, 9683, they are in Part 1D-1 and are adjourned in that court to criminal court for January 4, 1971. Is that correct?

MR. PELCYGER: The four cases?

MR. BARRA: No, only two. I don't know about the other two cases. That's why I mentioned docket numbers.

MR. PELCYGER: Yes.

THE COURT: Is your name Clifton Glover?

THE DEFENDANT: Yes, sir.

THE COURT: Is Mr. Pelcyger your lawyer?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you hear me ask him in your presence, in open court, with regard to whether or not the matter for which you have been sentenced in the Federal Court, whether there has been a notice of appeal filed?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you had any other lawyer other than Mr. Pelcyger concerning the case in Federal Court?

THE DEFENDANT: No, your Honor.

THE COURT: Have you of your own, without knowledge of Mr. Pelcyger's part, filed notice of appeal with regard to the judgment sentence and conviction in the Federal Court?

THE DEFENDANT: No, your Honor.

THE COURT: Now, Mr. Pelcyger says he has talked to you about this case and certain other cases which are pending in the lower court; but that with regard to this case, indictment No.2621 of 1970, that you now want to withdraw your plea of not guilty and you want to plead guilty to the first count of the indictment, criminally selling a dangerous drug in the third degree.Is that what you want to do?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you on or about April 16,1970, in the County of Kings, knowingly and unlawfully sell to a person a narcotic drug, to wit, heroin?

THE DEFENDANT: Yes, your Honor.

THE COURT: Where did that take place?

THE DEFENDANT: 722 Halsey Street.

THE COURT: All right. Take the plea.

THE CLERK: What is your name?

THE DEFENDANT: Clifton Glover.

THE CLERK: Clifton Glover, is Mr. Eugene Pelcyger who stands beside you your attorney?

THE DEFENDANT: Yes, sir.

THE CLERK: Clifton Glover, you are advised pursuant to section 335-C of the Code of Criminal Procedure, if you have previously been convicted of any crime or offense, that fact may be established after your plea of guilty in this action before the Court now, and you may be subject to different or additional punishment.

Clifton Glover, in the presence of your attorney, Mr. Eugene Pelcyger, who is standing beside you, you now say that you wish to withdraw your previous plea of not guilty heretofore entered to indictment No. 2620 of 1970, and that you

now wish to plead guilty to the crime of criminally selling a dangerous drug in the third degree, a class C felony, under the first count of the indictment in full satisfaction of this indictment; this plea will also cover four criminal court cases, docket No.A7989, docket No. A7990, docket No. A9687 and docket No. A9683. Is that what you wish to do?

THE DEFENDANT: Yes, sir.

(Defendant was sworn.)

THE CLERK: Do you personally waive two days notice of sentence?

THE DEFENDANT: I do.

THE CLERK: If you have any legal cause or any other reason why the judgment of law should not be pronounced upon you at this time, say so now and address yourself to the Court. Do you wish to say anything?

THE DEFENDANT: No, sir.

THE CLERK: Mr. Pelcyger.

MR. PELCYGER: Your Honor has a full report and have gone over the facts quite thoroughly. I have nothing to add.

THE COURT: Mr. Reporter, just correct one number in the recitation by ther Clerk, which was certainly unintentional. He said 2620. I said the in-

dictment number is 2621. Will you change his to read 2621.

Now, this defendant presently has been sentenced to a term of five years, and I understand the federal authorities is going to deal with him, and he will be -- I have no control of it -- sent from West Street when they know that this case is over, or any cases that he has here are over. Incidentally, do you have any case in any other Court?

THE DEFENDANT: No, sir, none at all.

THE COURT: So he is going to be dealt with there for that crime. I don't feel that at this point, (1), that this defendant should be examined because of the fact that the charges in this case concerns itself with drugs, because I wouldn't even wait or think of waiting until he does his federal time and then send him to a program. I have looked at his record, and I don't believe that he is an addict anyhow. I know that in most these cases,in this particular case,the plea has been following, but nothing can be served by keeping this defendant within the confines of the Federal Detention House, where he is now, another six or seven weeks until they get a probation

report. That would not alter the sentence that I would impose; and since he is not going to a state institution, we do not have to have a probation report, in my opinion, to send on to the Federal Pen. I don't think they are concerned; and if they want to find out, they certainly are thorough and can find out.So that the sentence of the Court is conditional discharge. Now we are through with him.

THE CLERK: Advise him of his rights to appeal.

THE COURT: Now, just a minute. Mr. Glover, in the presence of your lawyer and here in this open courtroom, I am advising you that you have a right to appeal from this sentence. You have 30 days within which to file a notice of appeal. If you desire to appeal, you are to file a copy of the notice of appeal with the Clerk of the Court and with the District Attorney's Office. If you have not money for a lawyer and you notify the Appellate Division at 45 Monroe Place in Brooklyn, that Court will furnish you counsel free of charge.

MR. PELCYGER: The defendant advises me that he has not desire to file an

appeal, if the Court pleases.

THE COURT: All right.

- - - -

APPENDIX M

DEPOSITION OF ANGELO A. BARRA

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DOMINIC S. RINALDI

Plaintiff

-against-

THE VILLAGE VOICE, INC., and
SCALI, McCABE, SLOVES,INC.

Defendants

Deposition of Assistant District Attorney, Angelo A. Barra, taken pursuant to subpoena, held in the office of Irwin N. Wilpon, Esq., 50 Court Street,Brooklyn, New York, on October 3, 1974, at 11:00 A.M. before a Notary Public of the State of New York.

* * *

PAGE # 4

Q. Were you an assistant District Attorney on October 28, 1970?

A. Yes.

Q. Do you recall the case of People v. Clifton Glover which was before Judge Rinaldi on that day?

A. That's correct. Yes, I do.

* * *

PAGE # 7

Q. The intention of the conditional discharge was that the defendant was to serve his five years Federal sentence, and that no additional time would be given?

A. That's correct, yes.

Q. You had no objection to that?

A. I did not.

* * *

APPENDIX N

COURT MINUTES, PEOPLE V. VARIO

AUGUST 11, 1967

---°°°0°°°---

THE CLERK: Indictment number 421-65, Paul Vario; indictment number 162-63, Benjamin Greenfeder; indictment number 162-63, Salvatore Vario.

(The defendants appeared before the Court together with their attorneys.)

THE COURT: We will take them backwards. I will now hear indictment number 162-63.

MR. LEWIS: If Your Honor pleases, the defendant at this time wishes to withdraw his plea of not guilty and plead guilty to Section 439 of the Penal Code as a misdemeanor.

THE COURT: Mr. Brenner, would you make your application?

MR. BRENNER: If the Court pleases, the defendant Greenfeder at this time respectfully requests permission to withdraw his previous plea of not guilty to indictment number 162-63 and plead guilty to the crime of violation of Section 439 of the Penal Law as a misdemeanor in satisfaction of the indictment.

MR. CONLON: If it please the Court, the district attorney would like to impose his point of view on the record.

The indictments under 162-63 originally was an indictment of five defendants. This case was brought to trial, and after a trial extending between two and a half to three months a conviction was obtained.

MR. BRENNER: May I interrupt at this time? During the trial the count of being a common gambler was dismissed at the close of People's case for lack of proof.

THE COURT: What do you understand 439 to be?

MR. BRENNER: I know it is bribery, but when he said they were convicted, I want to clear the record that that count in the indictment was dismissed.

MR. CONLON: Now, during the trial of that action a number of wiretaps were introduced which at that time had not been transcribed. The case was taken up on appeal, and on the appeal it was reversed as to Greenfeder, Vario and Marinacci. Augusta having failed to complete, to perfect his appeal, the appeal was not granted as to him. In the meantime, Columbo passed away.

Under the changing rules of both the Court of Appeals and the United States Supreme Court, the People feel at this point that certain evidence would be suppressed and would no longer be available to us on the trial of this action. As a result of that we have a grave doubt that if we pressed this case to prosecution that we could successfully prosecute to the point of conviction. There is a possibility that on some minor counts we might be able to gain a conviction.

However, in view of all this and in view of a change in status of certain witnesses of the People, we feel that in the interest of justice we ought to dispose of this matter because of its age. It is now over four years old in justice to all parties concerned.

We, therefore, respectfully recommend the acceptance of the plea as offered.

THE COURT: Let the record further indicate before I commence to interrogate the defendants that there has been an agreement, as stated in Mr. Conlon's statement. He didn't participate in the agreement. The agreement was made between Mr. Brenner, Mr. Lewis and Mr. Frank Rhi-

now of the District Attorney's Office. This morning there was some misunderstanding, and we are back again with reluctance on the part of Mr. Rhinow of the District Attorney's Office to accept the misdemeanor plea.

I have spoken to Mr. Aspland to whom I had spoken before, and he indicated that for the reasons set forth by Mr. Conlon in this record the interests of justice would be served, and that this would be the best way to dispose of this matter.

From my own personal standpoint, I feel from the age of these cases that the Appellate Division also would feel that this type of case, to continue to keep it on the district attorney's calendar,would not be proper.

Therefore, for all the reasons concerned, the defendants have made their pleas and made their offer. Each defendant I believe realizes that in spite of the district attorney's position,they don't want to gamble, and they are willing to compromise. And, therefore, they are offering these pleas.

MR. BRENNER: That is correct, Your Honor, as far as the defendant Greenfeder

is concerned.

MR. LEWIS: That is correct as to the defendant Salvatore Vario.

THE COURT: I assume you want to make another statement with regard to Paul Vario?

MR. CONLON: Now, as to Paul Vario, the problem, while it is an entirely different factual situation, the problem basically remains the same because the same witnesses are involved. Due to certain developments which I shall not place upon the record regarding this witness. He is available, and we could go to trial. But again, we have the problem of intercepted messages, wiretaps, possible suppression of certain evidence, eavesdropping. In view of all of these facts, we make the same recommendation as to the acceptance of the plea on Paul Vario in indictment number 421-65.

* * *

BY THE COURT:

Q. Paul Vario, is that your name?

A. Yes, sir.

Q. Is Mr. Lewis your attorney?

A. Yes, sir.

Q. Have you been attending here all morning:

A. Yes

Q. And you have been listening to the conversations before where your lawyer offered to plead and since then?

A. Yes.

Q. Your lawyer says that with regard to indictment 421 of 1965 that you now want to offer a plea of guilty to a violation of Section 439 of the Penal Law as a misdemeanor to cover the charges in this indictment. Is that what you want to do?

A. Yes, sir.

Q. On or about June 30,1964,in the hamlet of Hampton Bays, Suffolk County, did you attempt to bribe one Everett Hoelzer who was then connected with the Police Department in Suffolk County?

A. Yes, sir.

Q. No, as I said to the other two defendants, and I say to you, sir, that from all the conversations you heard, the application made by your lawyer, and the explanation by the district attorney and whatever this Court has said on the record, there is a possibility that if you went to trial you might get an ac-

quittal, and then again you might not. Knowing that do you still say that you are willing to compromise and you are offering this plea?

A. Yes, sir.

THE COURT: All right. Take the plea.

BY THE CLERK OF THE COURT:

Q. Paul Vario, as to indictment 421-65 do you understand English?

A. Yes, sir.

Q. Have you discussed your case with your lawyer?

A. Yes, sir.

Q. Did you hear your lawyer offer to withdraw your plea of not guilty and offer to plead you guilty to Section 439 of the Penal Law as a misdemeanor as to count one in full satisfaction of indictment 421-65?

A. Yes, sir.

Q. Has any promise been made to you to induce this plea by the district attorney, your lawyer, the clerk of the court, or anyone connected with this Court?

A. No, sir.

Q. Are you pleading guilty of your own free will:

A. Yes, sir.

Q. Do you know that your plea of guilty is an admission that you committed the crime which you now plead guilty?

A. Yes, sir.

(The defendant signed the statement on plea.)

P A U L V A R I O , being called as a witness in his own behalf, being first duly sworn, testified as follows:

BY THE CLERK OF COURT:

Q. What is your true name?

A. Paul Vario.

Q. Where were you born?

A. Brooklyn, New York.

Q. What is your date of birth?

A. July 10, 1914.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Are your parents living?

A. Father is dead. Mother is living.

Q. Are you married or single?

A. Married.

Q. Where do you reside?

A 968 Hemlock Street Brooklyn.

Q. Can you read and write?

A. Yes, sir.

Q. Have you learned or practiced any mechanical trade?

A. I am a baker, barber. I am everything.

Q. What is your trade or occupation?

A. Florist.

Q. How long have you been a florist?

A. Twelve years.

Q. What is your religious faith, if any?

A. Catholic.

Q. Are you addicted to the use of intoxicating liquors.

A. No.

Q. Any previous convictions?

MR. LEWIS: Stands mute.

THE COURT: All right, September 8th for sentencing. All bail is continued.

* * *

APPENDIX O

COURT MINUTES - PEOPLE V VARIO

SEPTEMBER 8, 1967

* * *

THE COURT: Counsel for Paul Vario, Mr. Lewis, is there anything you want to say?

MR. LEWIS: Yes, your Honor.

As you know, the defendant did take a plea to a misdemeanor in this case. It's an unusual situation which stems from the case in which his brother was involved, it was an alleged bribe to obtain his brother's release on a certificate of reasonable doubt which, as a matter of law, could not have been accomplished because his brother had a previous felony and, therefore, even our chief judge of the Court of Appeals, and may I respectfully say in view of all the circumstances in this particular case, no money was passed, I briefed it, it's a very technical question of law involved and under all the circumstances I deem it best in the interest of the defendant to take the plea so may I respectfully urge your Honor at this time to suspend the imposition of sentence.

* * *

THE COURT: I'm sorry, the district attorney wishes to be heard, I apologize.

MR. CONLON: That's quite all right.

It is the recommendation of the district attorney's office, your Honor, that looking back throughout the entire history of these cases, time, energy, et cetera has been spent and I heartily agree with Mr. Brenner that the trial of a criminal case is at best at times a tenuous thing which can go in either direction. We too are aware of the obstacles that now face the prosecution and with that in mind we, of course, were amenable to the pleas that were offered by counsel. Nevertheless, it is the position of the district attorney's office that a great deal was involved here which would be be left unsaid. It is the recommendation of the district attorney that in each of these cases the Court impose a jail sentence.

THE COURT: Thank you.

* * *

Paul Vairo, is there anything that you want to say other than what your lawyer sail?

DEFENDANT PAUL VARIO: No

THE COURT: I'm treating you the same The fine is $250 or three months in the County Jail.

DEFENDANT PAUL VARIO: Thank you, your Honor.

* * *

APPENDIX P

COURT MINUTES - PEOPLE V. AGRO

MARCH 10, 1966

* * *

THE COURT: Now, I'll take an application from counsel for Salvatore Agro. Who else? What other misdemeanor pleas do we have? That's it, isn't it?

MR. PANZARELLA: Yes, sir.

THE COURT: Is that right? How many defendants do I have? One, two, three,four. All right, that's it.

THE CLERK: I think that's it Judge.

THE COURT: Mr. Brodsky?

MR. BRODSKY: Yes, sir. Abraham H. Brodsky, attorney for Salvatore Agro, 111 Broadway. If Your Honor pleases, at this time defendant Salvatore Agro offers to withdraw plea of not guilty heretofore entered to indictment number 1986 of '65, and offers to plead guilty to the crime, plead guilty to the crime of petit larceny under the third count of the indictment in satisfaction of the indictment.

THE COURT: All right, Thank you.

MR. BRODSKY: To each and every count of the indictment.

THE COURT: Are you recommending this plea?

MR. PANZARELLA: I recommend that.

THE COURT: All right. Now, I am taking these pleas and if the other three men don't come in and take these pleas then all bets are off.

MR. PANZARELLA: Yes, sir.

* * *

THE COURT: Mr. Salvatore Agro.

MR. AGRO: Yes, sir.

THE COURT: Mr. Brodsky your lawyer?

MR. AGRO: Yes, sir.

THE COURT: I want you to know that I instructed your lawyer the other day to ask you to come down here, to present yourself in Court and I know that you were here, I think, it was the day before yesterday, is that right, or was it yesterday?

MR. AGRO: Yes.

THE COURT: And, has Mr. Brodsky spoken to you about your case?

MR. AGRO: Yes, sir.

THE COURT: In addition to speaking to you about your case has he told you that a motion was made before another Judge of this Court to dismiss the indictment upon inspection of the grand jury minutes?

MR. AGRO: Yes, sir.

THE COURT: And has he advised you

that the Judge more or less advised Mr. Brodsky -- you see, these fellows know more about this case than I do - I am only going to learn about it after I get the probation report -- that there is enough in this case, he told you for the purposes of going to trial.

MR. AGRO: Yes, sir.

THE COURT: And has Mr. Brodsky told you that after consideration, that you are better off not gambling and offer a plea of petit larceny?

MR. AGRO: Yes, sir, he told me.

THE COURT: In the presence of the other lawyer? You see, I don't hide anything. That's the way I do business. He has told me that you still feel that you had little or nothing to do with this.

MR. AGRO: Yes, sir.

THE COURT: And that I'll take into consideration when the time comes for me to do it. By that time I'll have all the necessary information before me, so now I ask you, do you want - did you hear Mr. Brodsky say you want to plead guilty to the crime of petit larceny?

MR. AGRO: Yes, sir, Your Honor.

THE COURT: During the time of 1964 that is referred to in this indictment,

did there come a time - I don't know whether you got - you probably did - get anything out of this, but in order for me to take the plea I have to know from you that you knew about this and in some way, no matter how slight, participated in this matter.

MR. AGRO: Yes, sir.

THE COURT: And is that the reason that you are pleading guilty?

MR. AGRO: Yes, sir.

THE COURT: All right, take the pleas.

THE CLERK: Shall I take them all together, Judge, all at once?

THE COURT: Well, suppose you take Agro first and then you can take the others all at one time. Agro is not involved with any other indictments.

THE CLERK: All right, Judge. Salvatore Agro,you are advised that pursuant to section 335b of the Code of Criminal Procedure that if you have previously been convicted of any crime, that is established after your plea of guilty in this case, you may be subject to a different or additional punishment. Do you now in the presence of your attorney Abraham Brodsky,with draw -

MR. BRODSKY: Don't forget the "H".

THE CLERK: Abraham H. Brodsky, withdraw your previous plea of not guilty and now plead guilty to the crime of petit larceny to cover the entire indictment?

MR. AGRO: I do.

THE CLERK: Do you waive a definite date for sentence?

MR. AGRO: Yes.

MR. BRODSKY: Just a minute.

THE COURT: With regard to sentence--

MR. BRODSKY: Just a minute.

THE COURT: -- when you are through taking all the pleas I shall fix a date. I'll fix it now as May 25th for sentence.

THE CLERK: May 25th.

THE COURT: Mr. Agro, you live out of town?

Mr. Agro: Yes, sir.

THE COURT: You were brought here from Buffalo by your lawyer.

MR. AGRO: Yes, sir.

THE COURT. If for any reason there is not going to be a sentence on that day, your lawyer will notify you at least two days before, but if you are notified to come and don't come you may be committing another crime and that crime will be the crime of bail jumping; do you understand that?

MR. AGRO: Yes, sir.

THE COURT: Today, when you leave here, you will have to go to the probation department. I think they'll get through with you today so you don't have to hang around.

THE CLERK: Bail is continued you said?

THE COURT: Bail is continued.

THE CLERK: Allright. Raise your right hand.

* * *

APPENDIX Q

COURT MINUTES - PEOPLE V AGRO

SEPTEMBER 12, 1966

* * *

THE CLERK: What is your name?

THE DEFENDANT: Salvatore Agro.

THE CLERK: Salvatore Agro, under indictment number 1986, in the presence of your attorney, Mr. Abraham Brodsky, if you have any legal cause or anything else to say why judgment of sentence should not be imposed upon you say it now and address yourself to the Court. You, Salvatore Agro, and your attorney, may address the Court. Do you, Salvatore Agro, wish to say anything to the Court?

THE DEFENDANT: No, sir.

THE CLERK: MR. Brodsky?

MR. BRODSKY: If your Honor, please, I have nothing to add to what I already discussed with Your Honor at the time of the taking of the plea. We went into all the facts in great detail. You questioned the defendant at that time. I rest on that.

THE COURT: New York Penitentiary, execution of sentence suspended. No probation.

- - - -

APPENDIX R

STATEMENT OF ASSISTANT DISTRICT ATTORNEY PANZARELLA as to PLEA AND SENTENCE IN PEOPLE V AGRO

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PEOPLE OF THE STATE OF NEW YORK — IND. NO. 1986/1965

-AGAINST-

HERMAN WITT
SALVATORE ARGO
STEPHEN HIRSCHORN,
A/K/A BERTRAM WILLIAMS
ABE LEVINE
A/K/A MAL REIF
LOUIS QUENTIN LEONE
RAYMOND LEONE
FREDERICK GRUBERT

DEFENDANTS

The above named defendant having been indicted September 22,1965, for the crimes of FORGERY-SECOND DEGREE:
GRAND LARCENY-FIRST DEGREE

I, On March 10,1966,before Hon. DOMINIC S.RINALDI, in Part VII of the Criminal Term of the Supreme Court, Kings County, recommended the acceptance of a plea of guilty to the crime of WITT-ATT. G.L.-FIRST DEGREE, Third Count of the Ind. also to cover Ind no.2784/64. ARGO-PET. LAR.3rd Count of Ind. HIRSCHORN-ATT.G.L.-1° 3rd count for the following reasons: also to cover Ind.no. 2785/64. R. LEONE-ATT.G.L.-1° to cover Ind.no.2050/1964.

The seven defendants above mentioned were indicted for acting in concert in a larceny in a case known as the, "Mays Department Store" case.

Herman Witt is 40 years of age and has a criminal record dating back to 1943. This defendant was the "Ring Leader" of this operation. This defendant took a plea of guilty to Attempted Grand Larceny-First Degree, the third count of the indictment to cover this indictment and also indictment No.2784/1964.

Salvatore Agro is 38 years of age and has no prior record. This defendant was the least culpable of the defendants herein and took a plea of guilty to Petit Larceny, the third count of the indictment.

Stephen Hirschorn is 33 years of age and has no prior record. He took a plea to Attempted Grand Larceny-First Degrre,the third count of the indictment also to cover indictment no. 2785/1964.

By_____

_____19

The assistant District Attorney accepting a plea must fill out this form in duplicate;file one copy with the Court and one with the papers in the case.

Raymond Leone is 44 years of age and took a plea of guilty to Attempted Grand Larceny-First Degree, the third count of the indictment also to cover indictment no. 2050/1964.

Abe Levine,also known as Mal Reif is 44 years of age and has a prior record dating back to 1937. This defendant was also one of the least culpable and took a plea to Petit Larceny, the third count of the within indictment to cover the indictment on March 17, 1965.

Louis Quintin Leone is 45 years of age and has a prior record dating back to 1940.He was one of the least culpable of the defendants and took a plea to Petit Larceny the third count of the indictment to cover the indictment on March 17,1965.

Frederick Grubert is 39 years of age and has no prior record.This defendant is also one of the least culpable of the defendants took a plea to Petit Larceny under the third count of the within indictment to cover the entire indictment on March 28,1966.

At,about or between July 6 and July 31,1964, the defendants acting in concert did counterfeit,forge and deposit simulated checks of the Mays Department Store to various fictitious bank accounts.

The pleas in each instance are recommended and that sentence will in all respects be adequate.

A plea had not been previously accepted and then withdrawn by the defendant before the above plea taken.

AARON E.KOOTA
DISTRICT ATTORNEY

Date filed

BY:EDWARD PANZARELLA
Asst. District Attorney

December 7,1970
EP:DP 11/25/70

APPENDEX S

LETTER OF BROOKLYN BAR ASSOCIATION

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn, N.Y.11201
MAin 4-0675

EDWARD J. CONNOLLY
President

November 28,1972

The Village Voice
80 University Place
New York, New York 10003

Attention Daniel Wolf, Editor

Gentlemen:

In your issue of October 12,you published an article entitled "Judge Corso and the Mafia." The two judges mentioned are members of the bench in Kings County.

The Board of Trustees of the Brooklyn Bar Association directed me as President to appoint a Committee to investigate the charges made in your magazine. I now have the results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect.The sources from which we obtained our information are equally available to your reporter and it is regrettable that he did not take the time to investigage fully or properly.

Very truly yours,

BROOKLYN BAR ASSOCIATION
Edward J. Connolly,
President

EJC:sb

APPENDIX T

LETTER OF BROOKLYN BAR ASSOCIATION TO NEW YORK MAGAZINE

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn, N.Y.11201
MAin 4-0675
EDWARD J. CONNOLLY
President

November 28,1972

New York Magazine
207 East 32nd Street
New York, New York, 10016

Gentlemen:

In your issue of October 16 you published an article entitled "The 10 Worst Judges in New York." Two of those judges are members of the bench in Kings County.

The Board of Trustees of the Brooklyn Bar Association directed me as President to appoint a Committee to investigate the charges made in your magazine. I now have the results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect. The sources from which we obtained our information were equally available to your reporter and it is regretable that he did not take the time to investigate fully or properly.

Very truly yours,

BROOKLYN BAR ASSOCIATION

EDWARD J. CONNOLLY,
President

EJC:sb

APPENDIX U

LETTER OF JOSEPH VINCENT MORELLO TO NEW YORK MAGAZINE

October 12, 1972

The Editor
New York Magazine
207 E.32nd Street
New York, New York 10016

Sir:

In reference to Newfield's article on the 10 worst judges.

I want to comment on his charges against Judge Rinaldi. Newfield accuses Rinaldi of letting a heroin seller go without bail.

Your author had elaborated these charges in a Village Voice article this past summer.

A brief glance at the court records will indicate:

1. Rinaldi did not arraign this defendant on the drug charge; he was arraigned before another Judge and bail was set.

2. Rinaldi did release the defendant without bail on a bribery charge(arising out of the drug bust) however, he did so only upon the consent and recommendation of the District Attorney.

(I practice in the Brooklyn Supreme Court with Legal Aid, have appeared before Justice Rinaldi, My hair was fairly long and I never experienced any extra flack.)

If Newfield's research on other points and judges is as faulty as this,you really have done a disservice in publishing his story without verification. The judges are not permitted to respond and set the record straight and a decent respect for your readership requires special care and attention.

Very truly yours,
JOSEPH VINCENT MORELLO
Associate Attorney

APPENDIX V

LETTER OF LEONARD D. WEXLER TO NEW YORK MAGAZINE

October 17,1972

Editor,
New York Magazine
207 East 32nd Street
New York, New York 10016

Dear Sir:

Please find enclosed my letter in response to the article, "Ten Worst Judges."

Will you kindly print.my letter in response to Jack Newfield's article.

Very truly yours,

LEONARD D. WEXLER

LDW/Mel
Enclosure

Letter To The Editor:

I am a Suffolk County Attorney and have no experience or knowledge of the judges noted in the article of October, 1972 except that of Judge Rinaldi.

In criticizing Judge Rinaldi, Mr. Newfield referred to a specific case in Suffolk County, to wit: People vs: Vario, Maranicci and Greefeder. The article stated that Judge Rinaldi allowed Vario, Maranicci and Greenfeder to plea to misdemeanor charges and he imposed $500.00 fines although the District Attorney of Suffolk County thought the defendants should receive a ten (10) year jail term.

I was appointed by the Appellate Division, without compensation, to represent Maranicci on his appeal after he, Vario and Greenfeder were convicted by a jury on bribery charges in Suffolk County. The Appellate Division unanimously reversed the conviction on June 28, 1965 and held that the recording of wiretaps were defective and violated the defendants constitutional rights. Judge Field of the Court of Appeals, on February 1, 1966, denied the District Attorney of Suffolk County the right to further appeal the Appellate Division's unanimous decision of reversal and the case was referred back to Suffolk County for retrial. Pending the appeals, Vario was incarcarated for two (2) years on the invalid conviction and Maranicci spend time in state prision pending his release.

In August of 1967 the case was placed before Judge Rinaldi by the District Attorney of Suffolk County for retrial after the Appellate Division reversed the prior conviction. On August 11,1967 in open court and on the record, the District Attorney of Suffolk County stated, "Under the changing rules of both the Court of Appeals and the U.S. Supreme Court, the People at this point feel that certain evidence would be suppressed and would no longer be available to us on the trial of this action. As a result of that, we

have grave doubt that if we pressed this case to prosecution, that we could successfully prosecute to the point of conviction"..."We, therefore, respectfully recommend the acceptance of the plea (to a misdemeanor) as offered."

The recommendation by the District Attorney of Suffolk County as to the misdemeanor and fines were made by the District Attorney in open Court and on the record because the District Attorney, as stated, had no case. In addition, a misdemeanor carries a maximum of one (1) year in jail and Vario had already served two (2) years. Where did Jack Newfield get his facts?

Jack Newfield's reporting of this case out of context and by false innuendo's is yellow journalism of the worst kind.

I have no axe to grind and since I do not practice in the New York City Courts I have nothing to gain by writing this letter but I believe as an attorney with actual knowledge of the case, it is my duty to defend Judge Rinaldi, who is prohibited from defending himself by reason of the Canons Ethics.

LEONARD D. WEXLER, ESQ.

APPENDIX W

LETTER OF LEONARD D. WEXLER TO
HON. SAMUEL RABIN

October 17, 1972

Hon. Samuel Rabin
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Dear Judge Rabin:

I am enclosing a letter I have written to the Editor of the New York Magazine in response to their article, "Ten Worst Judges".

As an attorney who has knowledge of the case quoted in the article, I feel duty bound by the Canons of Professional Ethics number one, the Duty of the Lawyer to the Court, to answer the article.

Very truly yours,

LEONARD D. WEXLER

LDW/mel
Enclosure

APPENDIX X

REPORT OF ASSOCIATION OF THE BAR

June 8, 1973

Orville H. Schell, Jr., Esq.
President—The Association of the
Bar of the City of New York
42 West 44th Street
New York, New York 10036

Re: Newfield Article—
"The Ten Worst Judges in New York"

Dear Mr. Schell:

In early December 1972 you requested the Association's Committee on State Courts of Superior Jurisdiction to investigate the charges made by Jack Newfield against the judges within that Committee's jurisdiction in an article entitled "The Ten Worst Judges in New York", which appeared in the issue of New York Magazine dated October 16, 1972 (pages 32-36). A copy of the article is annexed hereto.

You indicated that your request stemmed both from the commitment of the Association to defend judges against unjust criticism and from the duty of the Association to investigate charges against sitting judges. As we have also discussed, the investigation is highly relevant to the adequacy of existing procedures for the discipline and removal of judges, an area of great interest to this and other bar associations. You imposed no conditions or restrictions on your request and made no recommendations with regard to the form our conclusions might take. You simply asked us to investigate the charges and to report to you what we found, together with any recommendations we might wish to make.

subcommittee to his attorney, who delayed fixing any date for an interview and ultimately simply defaulted. In addition, six or seven members of our Committee met with Mr. Newfield and his attorney, Martin Garbus, for almost two hours at the Association on December 28, 1972.

We have also conferred with the District Attorneys for New York and Kings Counties and with the Governor's Special Prosecutor, Maurice Nadjari. In addition, we had a check made of the files of the Association's Grievance Committee and Judiciary Committee and reviewed various recent investigative reports and articles which have appeared in The New York Times.

This description of the various sources of information resorted to by our subcommittees is not complete. The full reports of the various subcommittees, copies of which we are furnishing to you under a separate cover, indicate the additional sources relied on.

Having outlined generally the approach of the Committee and the sources to which it turned, it must be added that the Committee does not have subpoena or similar powers or an investigating staff, and to that extent the Committee is severely restricted in any investigation of this nature. No pretense can be made that these investigations are exhaustive or of the type that could be carried out by appropriate investigative authorities. Moreover, the Committee generally limited itself to the criticisms and charges in the Newfield article and to areas clearly related to the article—it did not attempt a full investigation of each judge listed by Mr. Newfield.

There follow the conclusions of each subcommittee with regard to the charges made by Mr. Newfield against the eight judges under our jurisdiction. The conclusions have been prepared in a manner deemed fit for publication by the

With the above in mind, and without any preconceived notions as to what our conclusions or recommendations might be, our Committee promptly commenced its investigation by forming eight subcommittees, each composed of three members, and assigning to each subcommittee one of the eight Supreme Court judges specifically listed and criticized by Mr. Newfield as being among his "Ten Worst". Those judges were Gerald Culkin, Wilfred Waltemade, Dominic Rinaldi, Albert Bosch, George Postel, Edward Dudley, Paul Fino, and John Monteleone. Justices Culkin, Waltemade, Postel, Dudley and Monteleone were approved by this Association. Justice Fino was rated "not approved", but based solely on his refusal to appear for an interview. There is nothing in the Association's files on Justices Rinaldi and Bosch.

While the method of investigation necessarily varied for the different judges depending on the nature of the charges, interviews of practitioners and court personnel were carried out extensively, as well as review of transcripts of trials or of opinions where appropriate. Charges or intimations of bias or corruption in particular required extensive review of transcripts and opinions. Where specific trials or proceedings were referred to, the subcommittees often attempted to interview the attorneys on both sides. In most cases such interviews were carried out successfully.

The Committee also decided at the outset of its investigation that it was not only appropriate but advisable from the point of view of fairness to interview the eight judges being investigated as well as Mr. Newfield himself. Seven of the eight judges were interviewed; the single exception was Justice Fino, whose secretary kept finding it impossible to arrange for an interview and ultimately referred the

Association, which simply means that every effort has been made to be fair and to avoid reliance on rumor or hearsay. While this constitutes a report of the whole Committee, it should be stressed that only the members of each subcommittee are familiar with that subcommittee's full investigation and therefore non-members of a particular subcommittee have relied on the ability and integrity of the membership of each subcommittee. After presenting these conclusions, we will indicate our recommendations as to what may appropriately be done by the Association on the basis of this investigation.

* * *

Justice Rinaldi

Mr. Newfield alleges that Justice Rinaldi is very tough on long-haired attorneys and black defendants on questions of bail, probation, and sentencing. Since he gives no examples to substantiate the charges, the subcommittee did not evaluate them.

Mr. Newfield's other charge, to which he devotes the balance of the section on Justice Rinaldi, is that his "judicial temper softens remarkably before heroin dealers and organized-crime figures". As to this charge he gives three cases as examples.

Mr. Newfield criticizes Justice Rinaldi for having released Norman Burton, an alleged heroin dealer, without bail after he had been arrested on charges of possession of heroin and attempting to bribe a policeman. Mr. Newfield ignores the facts that Burton was already out on $3,000 bail on another charge, that no bench warrant was ever issued against him, and that the Assistant District Attorney had assented to Burton's being paroled without bail.

Mr. Newfield also criticizes Justice Rinaldi on the ground that he gave a "conditional discharge" to another drug dealer, Clifton Glover, notwithstanding that Glover had two prior arrests for selling heroin and, according to Mr. Newfield, could have been given twenty-five years in jail. Mr. Newfield omits to mention that five months earlier Glover had pleaded guilty to an unrelated robbery charge in the federal court and had been sentenced to five years imprisonment, from which no appeal had been taken. The "conditional discharge" given by Justice Rinaldi came after plea bargaining and Justice Rinaldi recognized that Glover had also received the federal court sentence of imprisonment. The transcript shows that the Assistant District Attorney remained mute when the sentence was imposed.

In fact, Glover was not entitled to a conditional discharge under the Penal Law for a Class C felony. Justice Rinaldi told the subcommittee that he gave the conditional discharge, knowing that it was not legally correct, because the Assistant District Attorney told the Court that the defendant was an informer and that the defendant and the Assistant District Attorney had agreed on the conditional discharge sentence. As to this, the Assistant District Attorney apparently had no recollection. On the other hand, the most Glover could have been given was fifteen years, not the twenty-five suggested by Mr. Newfield. While an illegal sentence cannot be approved, the subcommittee found no justification for the motivation imputed to Justice Rinaldi by Mr. Newfield.

With regard to the case involving Marinacci and others, Mr. Newfield charges that Justice Rinaldi imposed only $500 fines after the defendants, "prominent organized-crime figures", pleaded guilty to misdemeanors, adding

that the District Attorney thought that three of them should have received at least ten years in jail.

Mr. Newfield fails to mention that an earlier conviction of three of the defendants had been reversed on appeal because wiretap evidence was held inadmissible and prejudicial. Thereafter, the two Assistant District Attorneys involved had disagreed as to the chances of a successful second prosecution. The defendants then appeared before Justice Rinaldi, and the Assistant District Attorney expressed doubts in open court about a successful conviction because of evidence problems and because the case was four years old. It was therefore agreed that the defendants would plead guilty to a misdemeanor and the Assistant District Attorney in court recommended the acceptance of the plea. Justice Rinaldi sentenced one of the defendants to time already served (more than twelve months), two others to a $500 fine or six months in jail, and the fourth to a $250 fine or three months in jail.

Clearly, the District Attorney's Office felt that the sentences were not severe enough, with the possible exception of the defendant who had already served twelve months, but there is no basis for the claim that the defendants should have been given at least ten years. Not only is it denied by one of the Assistant District Attorneys, but also the maximum jail sentence was one year for the misdemeanor for which the pleas were accepted. The probation report as to two of the defendants recommended a fixed jail sentence. As to another defendant, Justice Rinaldi imposed sentence without benefit of a probation report on the ground that he had pleaded guilty to a misdemeanor.

Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts.

* * *

APPENDIX Y

REPORT OF BROOKLYN BAR ASSOCIATION

The October 16, 1972 issue of "New York" magazine published a lead article entitled "The 10 Worst Judges in New York" written by one, Jack Newfield. During the same week (October 12, 1972 edition), the "Village Voice", a weekly newspaper published in New York City, contained an article by the same author, entitled "Judge Corso and the Mafia".

In its August 13,1972 edition, "The Village Voice" published another lead article by the same author, entitled "Brooklyn's Judge Rinalid, - Justice Gets a Fix". Two of the ten judges in the"New York" article are justices of the Supreme Court, Kings County, and are, therefore, the particular concern of the Brooklyn Bar Association.

This matter appeared on the agenda of the regular meeting of the Board of Trustees of the Association,held on October 11, 1972, at which time preliminary reports were given based upon conversations with Mr. Justice Monteleone, and an examination of some of the available records concerning the two cases mentioned in the aforesaid magazine article concern-

Judge Monteleone.

A preliminary report was rendered based upon conversations had with Justice Rinaldi's secretary.

Following discussion, it was the concensus of the Trustees that, based upon the facts as disclosed by the preliminary reports, the statements contained in the articles concerning Mr. Justice Monteleone and Mr. Justice Rinaldi were incorrect and misleading, and that these justices were unfairly and outrageously maligned. It was the further concensus of the Trustees that the confidence expressed by this Association in the judicial gualifications of Mr. Justice Monteleone and Mr. Justice Rinaldi when they were considered for judicial office be confirmed and that the statements made in the magazine article and newspaper articles about their judicial conduct be deplored.

The Trustees then considered what action should be taken by them. It was resolved that a committee be appointed by the president to make a detailed investigation of the facts in respect to the magazine article concerning Mr. Justice Monteleone and Mr. Justice Rinaldi, and those portions of "The Village Voice articles which

referred to Mr. Justice Rinaldi. President Connolly appointed Mr. Benjamin R. Raphael as a committee of one to make such an investigation and report with regard to Mr. Justice Monteleone. A separate report has been submitted by him. President Connolly appointed the undersigned, as a committee of one, to make an investigation and report concerning Mr. Justice Rinaldi.

The following are the facts developed: The magazine article referred to two cases in Kings County, and three in Suffolk County, as the basis for the charges made against Judge Rinaldi, and stated that "Rinaldi is very tough on long haired attorneys and black defendants on questions like bail, probation and sentencing. But his judicial temper softens remarkably before heroin dealers and organized crime figures".

The first case was People v. Norman Burton, who was indicted on drug charges (Indictment 6028/72); had a gun charge pending in the Criminal Court, and was indicted for attempting to bribe a police officer (Indictment 7715/1972). Defendant had pleaded not guilty to the drug charges before Mr. Justice Gittelson,and

had been released on $1,500.00 bail. Defendant was also on bail in the Criminal Court charge at the time Indictment 7715/72 was handed down by the Kings County Grand Jury. Defendant was arraigned on Indictment 7715/72 on August 8,1972 before Mr. Justice Rinaldi. Defendant was represented by Peter Antioco, Esq., of the firm of Oboler & Antioco, 26 Court Street,Brooklyn, New York, and the People by Assistant District Attorney Norman Silverman, Esq.

The magazine article states:

> "In August of this year Rinaldi had the case of Norman Burton, a junk dealer with twelve previous arrests. He was arrested on a charge of possession of heroin. He was also charged with trying to bribe the cop who arrested him. Justice Rinaldi released him with no bail..."

This case was also the subject of the August 13,1972 article by this author in "The Village Voice".

A review of the files in the Supreme Court with regard to Burton's two indictments, as well as the stenographic minutes of the bail hearing on indictment number 7715/72, leads one to the conclusion that the magazine and newspaper articles are untrue, misleading, inaccurate, a misrepresentation and contrary to the true facts. The author's treatment of Judge Rinaldi is calculated to create an impression which

is not borne out by the facts. These untruths, half-truths and misrepresentations concern the very heart of the accusations made against Mr. Justice Rinaldi.

The records of the Criminal Term, Supreme Court, Kings County, indicate that Norman Burton was initially arraigned on the drug charge under indictment 6028/1972, before Mr. Justice Gittelson, at which time people were represented by Assistant District Attorney Kellman, and the defendant represented by Mr. Antioco. At that time bail was fixed at $1,500.00, and bail was posted.

On August 8, 1972, Norman Burton was arraigned on the attempted bribery charge (indictment 7715/72), before Mr. Justice Rinaldi. At that time the People were represented by Assistant District Attorney, Norman Silverman, and the defendant by Peter Antioco, Esq. After pleading not guilty to the charge, a hearing was held on the question of bail. Following an extensive hearing, at which time the arresting officer was present, and it appearing that following the arraignment on the drug charge, Burton went to the District Attorney to complain about a shakedown by the arresting officer; he was arrested on the bribery charge, Since the defendant was

out on bail on the other charges, Justice Rinaldi paroled him. This matter has since been on in a conference part on three separate occasions. Burton was present at each and the parole was continued by Mr. Justice Mallen and Mr. Justice Abrams. (A copy of the bail minutes are submitted herewith).

Parenthetically, it is interesting to note that Burton had more like 22 previous arrests, rather than 12, as contained in the magazine article.

The second case referred to in the"New York" magazine article is that of Clifton Glover (indictment 2621/70).

According to the article

> "Glover had two prior arrests for selling heroin, and he could have gotten 25 years. Rinaldi let Glover plead guilty and gave him a conditional discharge - no time in jail on the narcotics charge".

A review of the file and plea minutes in connection with Clifton Glover further buttresses this writer's opinion that the author is guilty of "yellow journalism". While all the facts contained in the "New York" magazine concerning Glover are "correct", there were other facts that are a matter of record which are not reported, and without which the conduct and decision of Mr. Justice Rinaldi are distorted out of proportion.

From the sentencing minutes, one finds that at the time that Glover appeared to plead guilty to the "C" felony, he was in custody of the Federal authorities,awaiting a disposition on this indictment so that he could be sent to the Federal Prison at Lewisburg, Pennsylvania, to serve a five year sentence for bank robbery, a charge on which he had already pleaded guilty and had been sentenced.

While Mr. Justice Rinaldi had the discretion to impose a jail sentence on indictment 2621/1970, he saw fit not to impose a jail sentence. At the time of plea and sentence (a copy of the minutes of which are submitted herewith), the People were represented by Angelo F. Barra, Assistant District Attorney (who recommended acceptance of the plea), and the defendant was represented by Eugene Pelcyger, Esq. The Court having been apprised of the fact that Glover was to serve five years in Federal prison, dispensed with a probation report, and discharged the defendant conditionally. Glover was then remanded to the custody of a United States Marshal, and sent to the Lewisburg, Pennsylvania prison, where he was as of March 21, 1972, and presumably remains.

It is interesting to note that the dis-

trict attorney raised no objection to the sentence, nor did he make any recommendations in that regard.

When I raised that question at the time of my interview with Mr. Justice Rinaldi, I found that there were apparently other facts, not on record, of which the Court and Assistant District Attorney were cognizant.

The balance of the article in "New York" magazine refers to three Suffolk County matters, Vario, Marinacci and Greenfeder. The article charges that:

> "In 1967 he caused a local scandal when he permitted three prominent oganized crime figures charged with bribery and conspiracy to plead guilty to misdemeanors, and let them go free with only $500.00 fine. The District Attorney thought the three (Sal Vario, James Marinacci and Benjamin Greenfeder) should have gotten at least ten years in jail".

This portion of the "New York" magazine article is inaccurate and factually incomplete. At both the time of plea and sentencing, the People were represented by Assistant District Attorney Francis M. Conlon, the defendants Vario and Greenfeder were represented by private counsel, and the defendant, Marinacci, by Legal Aid. At the time of plea (a copy of the minutes are herewith submitted), the Assistant District

Attorney stated on the record that these defendants were in court as a result of an Appellate Court's reversal of an earlier conviction of these defendants following a trial, which lasted for two and one-half months. It was the opinion of the District Attorney that a new trial would probably result in an acquittal of the defendants on all charges, but perhaps some minor ones. As a result, the Assistant District Attorney recommended acceptance of the misdemeanor pleas.

At the time of sentencing (the minutes of which are submitted herewith), the Assistant District Attorney made the following statement:

> "It is the recommendation of the District Attorney that in each of these cases, the Court impose a jail sentence".

Mr. Justice Rinaldi, however, made the following dispositions: As to Salvatore Vario, who had served up to that time of sentence twelve and one-half months, he was sentenced to time served; the Court said "So far as I'm concerned, I'll make the sentence suspend, no probation". As to Benjamin Greenfeder, the sentence was a fine of $500.00 or six months in the County Jail. When requested to reduce the fine, the following colloquy occurred be-

tween his counsel and the Court:(pages 8 and 9)

> "MR.BRENNER: On that fine, your Honor, I would like to make this statement on behalf of Mr.Greenfeder. This has been, as your Honor can realize, a long and protracted litigation and it has cost Mr. Greenfeder many thousands of dollars both for legal fees and records and counsel and so forth, and I' wondering if your Honor could see fit to reduce the amount of the fine.
>
> THE COURT: No, I'm going to leave it at $500, counselor. I think as I look in the whole case, the probation report, the conditions of the recommendations of the district attorney, the Probation Department also appears to feel exactly like the district attorney and state they feel there should be a jail sentence. However, they recommend a fixed sentence of one year and in view of the age of the case and the type of a case that it is, I think in the interest of justice and the defendants are not being seriously hurt even though they did compromise, they will pay the fine as I have fixed it. So that as I have already stated as to Benjamin Greenfeder, the fine of $500. or six months in the County Jail".

Defendant, PAUL VARIO, was sentenced to $250.00 or three months in the County Jail, and the defendant, James Marinacci, was sentenced to $500. fine or six months in jail. (see minutes submitted herewith).

A careful reading of the minutes leads one to conclude that the reason no jail sentences were imposed was because the assistant district attorneys stated that they

could not prove a case against these defendants.

"The Village Voice" articles, in addition to alluding to the above, referred to the case of Richard DiNapoli. I am submitting herewith the decision of the Court in acquitting the defendant.

False and misleading articles as above referred to must be stopped by the Association of the Bar, if we, the lawyers and judges, are to comman and retain the respect, confidence and trust of the public. Articles such as these demand condemnation and refutation by the Association.

Dated, Brooklyn, New York
November 13,1972

Respectfully Submitted,

HOWARD S. KASS

I have interviewed the Judge and questioned him with regard to certain items upon which the records appear to be deficient. In his interview, the Judge satisfied me that in the specific instances referred to in the articles contained in the body of this report, the records sufficiently justify his conduct.

I further want to note that since the preparation of this report, another article has appeared in the "The Village Voice",by the same author, in its edition dated November 9, 1972, which has likewise misrepresented these same cases.

HOWARD S. KASS

APPENDIX Z

ARTICLE IN THE DAILY NEWS FRIDAY

JUNE 16, 1972

STATE PROBERS PUT SPOTLIGHT ON 4 JUSTICES

By Donald Flynn

The Joint Legislative Committee on Crime yesterday brought out the names of four Supreme Court Justices who, it said, handed down wrist-slap sentences in felony narcotics cases. Mention was made of a Criminal Court judge who is the subject of a federal investigation.

After hearing testimony that one of the justices, Xavier C. Riccobono, sentenced a reputed big-time narcotics dealer to what turned out to be seven months in jail. Sen. Abraham Bernstein (D-LBronx) snapped:

"I'm appalled. Something is rotten in Denmark."

The committee's executive director,John F. O'Connor, and its counsel, Edward J. Mc. Laughlin, produced narcotics cops who had made big dope arrests only to see the suspects get off lightly.

Other Justices Named

The other justices whose names were mentioned were Gerald P. Gulkin, whose name came up in two cases, Harry B. Frank and Dominic S. Rinaldi.

According to O'Connor, the unidentified Criminal Court Judge handled a case involving narcotics cop Robert L. Leuci, who was an undercover cop working for the Knapp Commission and later with federal authorities.

Drug Cache Seized

Leuci was to be subpenaed for the hearings in the County Lawyers Building, 14 Vesey St., but O'Connor said the committee was asked not to bring him in because of his Knapp Commission work.

O'Connor said Leuci helped arrest three men on July 30,1969 and seized 30 ounces of heroin--enough to send its possessors to prison for 25 years to life if they were convicted.

But Leuci told the committee that the judge in the case, in a chat with the assistant district attorney in the courtroom corridor, told him he "had no case."

In court the judge dismissed charges against two of the three men, after conducting most of the questioning of Leuci. The third defendant later came up before Justice Frank and was allowed to plead guilty to a Class C felony and got one year, said O'Connor.

Had Criminal Records

All three defendants had criminal records.

O'Connor said the case probably helped push Leuci into his subsequent undercover work.

Detective Leslie Wolff, of the Narcotics Division told of arresting Gloria Canon and seizing seven pounds of cocaine in her apartment, indicating that she was part of a major operation. Although she could have received 25 years, Justice Culkin sentenced her to zero to three years, the committee said.

Detective Arnold Atkin told of finding a cache of heroin in a Port Authority Bus Terminal locker and of arresting Arnold Deveroux, who had a record of 19 arrests.

Justice Culkin allowed Deveroux to plead guilty to the lowest possible felony and gave him three years -- of which he actually served only nine months, the committee brought out.

In the case handled by Justice Riccobono, three suspects were arrested with two revolvers, two sawed-off shotguns and the makings of a narcotics factory in their possession. Two of the three were allowed to plead guilty to "attempted possession of a weapon" and served seven months each. The third suspect jumped bail.

No Such Charge

"Is there such a crime as attempted possession of a weapon?" asked committee chairman Sen. John Hughes (R-Syracuse).

"No sir," said McLaughlin. "But you can plead to laws that don't exist."

That's when Sen. Bernstein exploded. "I'm just appalled. All these weapons, and some one would allow a plea to a nonexistant charge and give him a year.

The top suspect of that trio had a record of 16 convictions - nine in narcotics - going back to 1942. He had been arrested 25 times.

Suspect Dope Vanished

Two other narcotics cops told the committee they suspected that some of the narcotics they sent to the police laboratory for chemical analysis disappeared.

Detective Charles T. Moore said he sent about a pound and a half of what he believed to be heroin to the lab and the lab reported back that only an ounce and a half was actually heroin.

There's a possibility something happened at the lab. It's a possibility my informant lied to me. Personally, I think

there ought to be an investigation", he said.

Patrolman Michael McTighe had the same suspicion in another case, he said, when he seized 23 ounces of what he thought was hereoin and cocaine, The lab said 7 1/4 ounces was dope.

The amounts are significant, because possession of 16 ounces of heroin or cocaine is a Class A felony and carries a penalty of a life term. Possesssion of 8 ounces -- a Class B felony -- carries up to 15 years.

Counsel McLaughlin said it seemed unusual to him that in three out of four instances that a narcotics cop sent 16 or more ounces in for analysis the report came back that there was less than 16 ounces.

Sen. Bernstein commented that although guns are almost always involved in narcotics arrests, weapons charges are routinely thrown out by the courts.

"A Double Break"

"It's very disturbing that people arrested for large quanties of drugs are permitted to plead to much lesser charges and then instead of getting the maximum sentences on the lesser charges they get the minimum. They get a double break."

The hearing continues today, with Bronx District Attorney Burton Roberts, Brooklyn District Attorney Eugene Gold, Special Assistant District Attorney Frank Rogers, citywide coordinator of narcotics prosecutions and representatives of Queens DA Thomas Mackell and Manhattan DA Frank Hogan expected to appear.

A spokesman for Justice Culkin said that the justice handles thousands of narcotics cases and could not remember the particular case mentioned in the testimony.

The other three justices could not be reached for comment.

APPENDIX AA

EDITORIAL IN DAILY NEWS SATURDAY

JUNE 17, 1972

ATTENTION, COTJ

COTJ in this instance means Court on Judiciary -- a tribunal headed by the Court of Appeals' Chief Judge which handles cases of alleged judicial misconduct.

Well, four State Supreme Court justices were listed Thursday by the Joint Legislative Committee on Crime (John F. O'Connor, executive Director) as allegedly having handed out astonishingly minor sentences in various major felony cases.

Most of these had to do with dope. But one involved three gents caught with an assortment of deadly weapons. Two were allowed by Justice Xavier C. Riccobono to plead guilty to "attempted possession of a weapon and sentenced to seven months apiece in jail -- but come to find out, friends, there is no such crime on the statute books.

The other three justices named by the committee are Gerald P. Culkin, Harry B Frank and Dominic S. Rinaldi. No one should prejudge these cases. But how about the COTJ getting busy on them at the earl-

iest possible moment?

And speaking of courts and judges, State Sen. Roy M. Goodman (R-L-Manhattan)comes up with a beef about --

LONG VACATIONS FOR JUDGES

-- which makes sense to us. Sen. Goodman is complaining specifically about that same State Supreme Court.

Despite big backlogs of unheard cases, the learned jurists customarily take from seven to 11 weeks off per year - a practice which Goodman terms "just nonsense."

He wants the Judicial Conference (also headed by the Court of Appeals' Chief Judge Stanley Fuld) to limit those vacations or even postpone them in urgent cases.

Your move. Mr. Chief Judge: and please move fast.

APPENDIX BB

PRE-TRIAL DEPOSITION OF DOMINIC S. RINALDI IN THE CASE OF RINALDI v. VOICE & SCALI

PAGES 171-172

* * *

Q Is it true that on that day Norman Burton was released without bail?

A He was paroled on the recommendation of the District Attorney which is part of the procedure. If the District Attorney does not parole and he asks for bail then the Court makes the decision. In this case the District Attorney indicated he was going to recommend parole, and I did in fact recommend parole. If you look at the minutes of the record on that day you will find that.

* * *

PAGES 187 - 189

A In the case of Clifton Glover, with regard to that, let us start out by stating that the law provides in A and B felonies and narcotic cases of this type, the statute reads that a conditional discharge is improper, is banned, you can't give a conditional discharge.

If you read on and if you intend to read the law, you will find the commentary by the legislature and the reason for abandon-

ing conditional discharge in this type of case was because the person who received such a conditional discharge would not be able to get supervision for the future. Immediately thereafter in this case I did give a conditional discharge. It appears to have been improper. However, this defendant who had been sentenced and has thirty days to appeal from the federal sentence - - and the record shows it and we have the record - - his time to appeal from the federal sentence has expired, so I knew at the time that the man basically was going to be in jail under the sentence of five years. For how long, I don't know.

However, I did check out the other day and he is presently in Terre Haute, Indiana in a jail there, so that he is still in jail. So if you look at the minutes you will find that.

MR. KOVNER: Off the record.

(Discussion off the record.)

MR. KOVNER: Back on the record.

BY MR. KOVNER:

Q Go on. I am sorry, Judge.

A If you look at the minutes you will find there is some brief discussions in the minutes. Because at the time this man was sentenced what was being done under the

New York State Addiction Control Commission. set up was sending the defendants to the New York State Addiction Control Commission. And my thinking was -- and if you will look at the minutes and it may not be clear but it is there -- to send this fellow to, give him a sentence to the New York State Addiction Control Commission concurrent to the five-year sentence. I felt it would be of no avail. And I felt that nobody could complain since the defendant was going to do five years. And I felt it would be of no avail. And I felt that nobody could complain since the defendant was going to do five years.

Who complained that we gave him a conditional discharge?

Q The five years that he had yet to serve was pursuant to a federal conviction on another narcotic charge; isn't that correct?

A I don't know whether it was a narcotics charge.

Q But it was a federal out-of-state conviction, was it not?

A It was not the State's Court.It was in the Southern District. That is all I can tell you. But I know that we had -- now let me tell you. I just adjourned the matter

two or three times for the purposes of determining whether the man's thirty days was up, so that he would not be able to appeal the federal sentence. So that I knew once he went in, he was going to do that sentence. Once he couldn't appeal that was the end of it. And as long as they would keep him it would be crazy on my part, not well thought out, to give him a consecutive sentence after he does five years even to the Narcotic Control Commission, which they were doing at the time with a jail sentence.

I could very well have given him a concurrent sentence, but I didn't. What I did was give him the conditional discharge.

* * *

PAGES 210 - 212

I would like to ask -- as far as Vario is concerned, Vario was one of the four defendants. You now have the minutes before you and Vario and three others have been convicted after a two and a half month trial the case then went to the Appellate Division. I think the case started back in 1963.

A Would you look at the face and see if it is a 1963 indictment? The matter came on before in 1967. The District Attorney at

that time was represented -- The District Attorney was a George Aspland. My part came before me with four defendants who had been out on bail. Two of them had been released, I think, by certificate of reasonable doubt that two had done some time before the decision in the court.

The Appellate Division of the Second Department had assigned one Leonard Wexler who wrote a letter to the newspaper after reading the article and it was repeated in the New Yorker Magazine.

And the District Attorney, at the time the plea was taken, made a statement in open court indicating that because the Appellate Division had taken certain tapes from the evidence and the Court of Appeals had refused permission to go to the Court of Appeals that they, the District Attorney, had legally no case at all and, if anything, these defendants could be convicted as of some minor charges. Based on that, counsel for each defendant and the District Attorney's negotiations, there came a time when each of the defendants, by consent of the District Attorney, permitted to plead to a misdemeanor.

During the course of taking the plea prior to taking the plea -- and I indicated you will find this in the record --I called

George Aspland and asked him because -- he had a man in his office by the name of Frank Rinow and Conlon. And Rinow had been on the outs about something. I called Aspland and told Aspland that I wanted to know from his whether or not his recollection was the same as Conlon's. And after he so indicated, I then -- we went on to court and we took the plea in open court. Each defendant was permitted to plead to a misdemeanor. Two of the defendants had done either twelve or thirteen months. The other two defendants - - after I got the probation report - - under the plea taken the maximum they could get was a year.

Greenfeder, I think, had been arrested three or four times subsequent to the time that he had been convicted in the case, which was sent back and reversed, of crap shooting,had been dismissed either two or three times. I don't have it before me at this time. Another defendant was reported to the probation to be earning $5.30 an hour working and living with his family. I think here in the City of Brooklyn. And the other two defendants had already done more than the time you could give them under a misdemeanor. And under my discretion I decided to impose a fine as to each of the

defendants, including Vario.

And by that I think the County got themselves a profit which they couldn't get if each of them were to receive a year. I didn't think Greenfeder should get a year and I think the fellow who was working and doing well should.

When the Probation Department and the District Attorney on the day of the sentence stood up and said, we recommend jail - - and I said, I'm not going to give jail.

And I gave each one a fine. That is the story on Vario. I never knew Vario before, and I don't know him now and I don't know him since. And if anybody looked at the minutes and read the minutes before they did anything or printed any of the stuff, they probably would have a second thought.

* * *

PAGES 216 - 218

Q Let us go to the Agro case as discussed in Exhibit G.

A It starts on the first page.

The next to last paragraph on the first page

A The next to last paragraph or --

Q Which begins "One case in which an organized crime figured fared well" -- I

think that is the beginning of the discussion of the Agro Case.

A There was no information that I had or even the slightest information. I knew it was a case that concerned itself with counterfeit checks in Mays Department Store. So far as the first page, the first paragraph generally states -- as a general statement I suppose that it is,more or less true. I don't know about the figure of $1 million. I don't think there was any such allegation at the time.

Now, with regard to the second paragraph which says "Seven persons were indicted in the swindle on charges of grand larceny and forgery. One of the seven, Salvatore Agro, was connected to the Mafia," I don't know whether he was or not.

Q Do you know now?

A I do not know now either, except what the press says. I have no -- I know nothing about any Mafia connection of any of these defendants at the time the case was before me or nor do I know it now.

Q Do you recall the case?

A Yes I do. I recall the case and if you want me to tell you generally --

Q I would like you to tell me generally focusing on the question of why Agro was

not sentenced to jail and other co-defendants were?

A I'll tell you. In the first place, Agro was. All of the others had decided to plead guilty. Agro's lawyer insisted that the defendant, Agro was innocent, and he would not plead guilty. Mr. Panzarello, the assistant District Attorney, indicated that he was willing to go along and have Agro plead to a misdemeanor.

And the lawyer said, we will plead to a misdemeanor but he's got no record.

I said, if he's got no record then I'll take it up at the time.

At the time the representation was both by the District Attorney -- you talked before about a yellow sheet, any sheet concerning Agro - - at the time indicated no prior arrests. Even if it had come to my attention later that he did have some prior arrests that is a long time afterwards.

Q You say the eight prior arrests were not on the yellow sheet?

A No yellow sheet was presented to me.

Q At the time of the sentencing?

A I am talking about the time of the plea.

Q "At the time of the plea."

A All right.

Q Okay.

A And the District Attorney, for all practical purposes, had consented they had that. The District Attorney had indicated in a conference between counsel, myself and the District Attorney that he had so little to do with this thing and he didn't know whether he had a case. As far as he was concerned he could get a suspended sentence and he had no record on the day of the sentence. There was no record. But when a Court makes a promise that he is going to suspend sentence, or he is going to give a year or he is going to give five years -- even if the law calls for a longer sentence our Appellate Division has been sending them all back -- a judge must keep the promise on the day that he makes the plea. If an error is made that is the end of it. That is the general rule.

Q You did make a promise that he would not do time?

A I indicated that he was going to get a suspended sentence.

Q On the basis of that fact that he had no prior record?

A That he had no prior record on the basis of the fact that the District Attorney indicated he had very little or nothing

to do with this thing. And that they did not want to try the case for all the defendants. That's why they gave him a misdemeanor because he wouldn't plead.

* * *

PAGE 235

A I haven't testified as to the - - Repressive towards Blacks," that is a lie. It is false and the records proves it. I would say maybe ninety-five percent, a hundred percent of the Negro lawyers will so testify.

* * *

PAGES 279 - 283

EXAMINATION BY MR. WILPON:

Q Judge Rinaldi, referring to the Glover case, I think you have already testified, but let me restate it.

Glover had been convicted in a federal court on a narcotics charge.

A No. Glover had been convicted in federal court not on a narcotics charge. I think it was a robbery.

Q There was a conviction in the federal court and he was sentenced to five years.

A He had been sentenced to five years and I waited for the purpose of taking the plea and sentencing in my court until thirty

days had passed as far as his being able to appeal--and that is reflected in the record--before I pronounced sentence.

Q That was with the knowledge and consent of the district attorney.

A The district attorney never left the courtroom. It was all done at the same time.

Mr. Barra, I think, was the district attorney and he recommended the plea and I sentenced and he was there present and made no objection.

Q When you sentenced Glover to a conditional discharge--

A The district attorney has never appealed that sentence.

Q The district attorney never objected to the conditional discharge sentence.

A No.

Q He has never moved, up to this day, to set it aside as illegal.

A No. If you want to know where the defendant is now, I think I gave it, but I have the full address now.

Q The defendant is still in federal jail.

A Yes; Terre Haute, Indiana, Post Office Box 33. It is called Farm Dormitory. His number is 70691 and I guess there is

another number, 158, which I think is the the cell number.

Q In sentencing Glover it was your intention not to give him any additional sentence because he was serving five years.

A He was serving five years and the time to appeal in his case was over, so I knew he was going to be away for whatever time the federal authorities were keeping him in those five years.

Q At that time you inadvertently did it in the form of a conditional discharge, overlooking the fact that it was not permitted in that particular type--

A That's correct. But since the, as I indicated on my direct examination, I have looked at the commentary under that particular section and the purpose and intent of the legislature was the conditional discharge was not considered proper under those circumstances because the person ordinarily would not be under supervision. In this case I knew that he was going to be under supervision.

Q As a matter of fact, you stated that on the record at that time, when you sentenced him.

A Yes.

Q It is in the minutes.

Referring to the Agro case, were there seven defendants in this case?

A That's right.

Q Do you recall the circumstances in which the seven defendants pleaded guilty?

A This case has been hanging around the courts for sometime. The district attorney was anxious to get rid of it. We had discussed it on several occasions and all of the other defendants had indicated their intention to plead guilty.

The defendant Agro indicated that he was innocent and wanted to go to trial. The district attorney indicated he would give him a misdemeanor and I could suspend the sentence and the district attorney indicated at the time that the defendant had no prior record.

Subsequent thereto, when I did sentence, I sentenced everybody else on the various terms that are indicated in that record and I suspended sentence on the defendant Agro. Had I not suspended, the district attorney indicated he didn't want to try Agro all by himself. That is the answer.

At the time that I did sentence I had a probation report on Agro which indicated that he had--I don't know what they call them now--two federal violations for nar-

cotics. That's the way they were listed in the probation report.

Q And the sentencing--

A On the sentencing, the district attorney indicated that he didn't want to try Agro and I should go along and give him the suspended sentence which I had indicated and promised the defendant because he had said so at the beginning.

Q And the district attorney had also promised him--

A Yes, he promised him when I took the plea because the district attorney didn't want to try the case.

* * *

PAGES 284 - 287

BY MR. KOVER:

Q On the Glover case, I see in the minutes that the district attorney recommended the acceptance of the plea, but I see no recommendation with respect to the sentence.

A But he was there when I did sentence and he didn't say anything, he didn't object.

Q On the Agro case you indicated it was the district attorney who had indicated to you that there was no prior record,

not one of the attorneys, not the attorney for Agro.

A I think both together. I think his attorney was Brodsky and Mr. Panzarella stood alongside of him. They both indicated--

MR. WILPON: The district attorney's statement is on the record.

Q But the district attorney did not promise a suspended sentence.

A No. I promised a suspended sentence.

The district attorney said, "He has no record. You can give him a suspended sentence."

Q But it came from you and not the district attorney, with respect to suspending the sentence.

A Sentencing is the court's province.

Q But the district attorney can't promise a sentence.

A He can, if he wants to, but it is up to me to carry it out. The district attorney here didn't want to try this casse because he had pleas as to seven. Agro said he was innocent. His lawyer indicated, together with Panzarella, "All right. If you give him a misdemeanor,we will ask the judge if he will give him a suspended sentence."

I said, "What is his record?" And both

indicated he had no record. When I got the probation report there was an indication that he had had two federal arrests and I think two convictions for something about narcotics. It doesn't say whether it was sales or what.

Q Did it indicate time served?

MR. WILPON: That is a confidential report; isn't it?

THE WITNES: Yes.

Q Did it indicate the sentence imposed?

A No sentence imposed. The probation department said it has two convictions, federal, narcotics, period.

THE WITNESS: May I look at it. I can't show it to you, but I can quote from it.

MR. WILPON: You can't show it to anybody.

THE WITNESS: I won't show it. The two convictions, failure to register as a narcotics violator.

Q Did you have the yellow sheet before you?

A No.

Q Is there any reason that you would not have had access to the yellow sheet prior to imposing sentence?

A If it is not in the file, it is not

there. If you come to our court today you will find hundreds of cases every day where we don't have a yellow sheet or any report on the defendant.

Q Was there any indication that the district attorney had made a promise with respect to the sentence?

A Only before me. He said, "You can give him a suspended sentence."

* * *

APPENDIX CC

PRE -TRIAL DEPOSITION OF JACK NEWFIELD IN THE CASE OF RINALDI v. VOICE & SCALI

PAGES 318 - 321

* * *

You now know that as a fact the district attorney did consent.

A That's what I am told.

Q You read the record. You had a copy of the minutes.

A Correct

Q The record indicates that the district attorney did consent.

A Correct.

Q Do you dispute the correctness of that?

A No.

Q I am referring to the same New York Magazine of November 13,1972 in which it contains your reply to this letter as well as others.

Will you please read into the record what you said in regard to Morello's letter.

A In regard to Mr. Morello's letter, Joe Hynes, the superb chief of the Brooklyn Rackets Bureau, and police Sergeant Tom Santise of the 79th Precinct, who looked into the case, both report that the DA's office did not consent to the release of the de-

fendant."

Q Is that all it says?

A "I must also point out how it is obviously in the self interest of the Legal Aid lawyer practicing in Brooklyn to praise Judge Rinaldi. Is he a Legal Aid lawyer?"

Q So it is quite obvious that letter of Morello was one of the letters that was forwarded to you for reply and you did reply.

A Correct.

Q The statement in Morello's letter that the district attorney consented is correct.

A That is true.

Q So that when you said in your reply that Joe Hynes, the superb chief of the Rackets Bureau and police sergeant Tom Santise of the 79th Precinct, who looked into the case, both report that the DA's office did not consent to the release of the defendant, that statement is incorrect.

A That is true.

Q You previously testified that you never asked Sergeant Santise whether the DA consented and he never told you so. So that your previous statement is false.

MR. KOVNER: Iobject to the question.

A I asked Santise after that letter came in.

Q I asked you before whether you ever asked him and you said no.

A I did not ask Sergeant Santise while I was writing the original article; I did ask him after New York Magazine sent me this letter.

Q But I also asked you if you asked him at any time and you said no. That statement is incorrect.

A Right.

Q At some point you did ask him and he gave you a false answer.

A Correct.

Q And you also asked Joe Hynes and he gave you a false answer.

A Correct.

Q Just to clarify it, you had never asked either Hynes or Santise whether the DA said it before you wrote the article.

A They never said. I think I asked one of them what was the role of the DA and they didn't know. I asked David and he didn't know.

Q Did you ask Hynes before you wrote the article?

A No.

Q Did you ask Santise before you wrote the article?

A That, I don't recall.

Q But you asked them when you replied to Morello. You went to them and asked them to verify Morello's letter.

A Correct.

Q But you found out that Morello's letter was correct.

A Correct.

* * *

PAGES 326 - 328

Q You have testified that if you knew that the district attorney had consented when you wrote the story, you would have put that in the story.

A Right. That would have been an added fact.

Q That would have been on plain fairness.

A Correct.

Q If you knew it and didn't write it, it wouldn't have been a fair story.

A If I knew it and withheld that information, it would have been unfair.

* * *

Q I am showing you a copy of a letter by a lawyer by the name of Wexler and ask you if it refreshes your recollection as to ever having seen that letter.

MR. KOVNER: May we have this marked.

Mr. WILPON: I want his answer.

A I don't recall seeing it.

MR. WILPON: Mark it.

(Copy of letter dated October 17, 1972 from Leonard D. Wexler marked Plaintiff's Exhibit 2 for indentification.)

* * *

PAGES 330 - 333

Q The next paragraph says, "Two weeks ago in The New York Times Nicholas Gage reported two other cases where Judge Rinaldi was suspiciously lenient with member of the Mafia. One case involved Paul Vario." And it says the other case reported by the Times of Sal Agro.

What you wrote in this article of yours was what you had learned from the article by Gage in the Times, is that correct, in reference to Vario and Agro?

A Yes.

Q You had never made any independent investigation of Vario and Agro before that time. You were relying on what the Times had said; is that correct?

A I conducted interviews with other people about the background of those cases.

Q Before you wrote this article, or did you base it on what you read in the Times? You are saying it was in the Times two weeks ago.

A After it appeared in the Times I talked to several people. Between the publication of the Gage article in the Times and the publication of this in the Voice I talked to several people in law enforcement about the background of those two cases, particularly the Agro case.

Q Who did you talk to?

A Confidentiality statute.

Q I am referring to the last exhibit, the article by Gage in the Times.

Do you see where it says, "Agro case"?

A Yes.

Q Do you see the paragraph where it says, "The assistant district attorney in charge of the case apparently concurred with the judge's decision. He later signed a report saying that the pleas in each instance are recommended and the sentence in all respects would be adequate"? You read that when you read the Gage article; didn't you?

A Yes.

Q Read the next paragraph.

He said in the report that Agro was the least culpable of the defendants. "Salvatore Agro was thirty-eight years old and has no prior record," Mr. Panzarella said.

Do you see that paragraph further down, "Moreover, the Times discovered in

the course of its investigation that contrary to what Panzarella said in his report Agro did have a previous record"?

A Yes.

Q In the Gage article you read that before you wrote your article, which is Exhibit C; is that correct?

A Correct.

Q Let's turn back to Exhibit C. "The other case reported by the Times involved Sal Agro, a Mafioso who was indicted for grand larceny and forgery. Agro pleaded guilty and was given a suspended sentence by Judge Rinaldi. Judge Rinaldi justified his lenience on the ground that the defendant did not have a previous record. On March 6, 1953 Agro was sentenced to a year in prison for his role in a heroin selling conspiracy."

When you wrote this, referring to the Times article by Nicholas Gage, you had read the Times article, you were relying on what Gage had said that the district attorney, Panzarella, had told the judge, that Agro had no previous record and that he was concurring in the plea and in the sentence; is that correct?

A Correct.

Q But you don't make any mention of

that in your article. You didn't make any mention of what Panzarella said in your article; did you?

A No.

Q Did you think it was fair to omit it? Knowing it, did you think it was fair to omit it and put the brunt on Rinaldi, who sentenced the guy who the district attorney said had no previous record?

A I think it was fair. I am summarizing that case in two paragraphs.

Q You mean The Village Voice limited you in space.

A No.

* * *

PAGE 343

Q Were you aware that the district attorney acquiesced in the disposition by the judge of the Glover indictment, that he made no objection to not giving Glover an additional jail sentence and never moved to vacate any sentences as illegal?

A Correct, I am aware of that.

* * *

PAGES 363 - 365

Q What does it say specifically about Judge Rinaldi, about anything that he did that's mentioned in that editorial?

A Well, this editorial refers back to the News article.

Q What does it say in the article:

A Don't keep interrupting me.

Q I'm asking you what is says.

MR. KOVNER: Let me say, the article speaks for itself.

A The editorial refers to the article of a preceding day which gives the history of the Glover case.

Q Where does it give the history of the Glover case in the article?

A The other Justices' names that are mentioned are Gerald P. Culkin, whose name came up in two cases, Harry B. Frank, and Dominic S. Rinaldi.

Q Where does it say anything about the Glover case?

A I read the record.

Q Does it say anything there about the Glover case?

A The Glover case is the one that came up at the hearing.

That case was the Glover case.

Q But it's not mentioned in the article? It's not discussed in the article, correct?

A Correct.

Q Now, the thing that's mentioned in the article is the same thing, the other

three judges named by the committee are Gerald P. Culkin, Harry B. Frank and Dominic S. Rinaldi?

A That is correct.

Q That's the only reference to Dominic Rinaldi in this editorial, is that correct?

A Correct.

* * *

PAGES 376 - 378

You say, "But his judicial temper softens remarkably before heroin dealers and organized crime figures."

You are charging Judge Rinaldi with favoritism to those type of defendants?

* * *

Q What's the basis of that statement?

A The Glover, Agro and Burton cases, which you have not disproved any facts on.

Q In the Burton case, what did the judge do? He had bail arraignment, is that correct?

A Correct.

Q The District Attorney consented to his bail disposition in that case,correct?

A Correct.

Q What's corrupt about that?

A No one mentioned the word corruption. It's a matter of judgment.

In none of these articles do I allege corruption or venality.

Q You don't maintain that Judge Rinaldi was corrupt or venal in any of these articles?

A No. I think the pattern here is one of competency.

Q Favoring heroin dealers and organized crime figures is not to you an indication of corruption?

A I have no evidence of corruption.

Q You didn't intend to imply corruption?

A Just bad judgment.

* * *

Q You don't see anything in the Daily News story about the mention of his name as a judge was mentioned? Is that what he said?

A I did the research as to why he was mentioned at that meeting.

Q Tell us why he was mentioned at that hearing?

A Police Detective came and testified about the Glover case.

* * *

PAGES 401 - 402

Q The statement that he's been repressive towards blacks, what do you base that on?

A Interviews with his colleagues and other Legal Aid lawyers, other general lawyers in Brooklyn.

Q But not on specific cases?

When you wrote this article you didn't have any specific cases in mind, is that correct?

A Correct.

* * *

Q Now, that he was permissive with heroin dealers and members of the Mafia, what did you base that on?

A You're on a merry-go-round. I answered that.

Q He asked me to split it up. Now you're telling me on a merry-go-round.

A That statement was based on my previous writing about the Burton, Glover, Vario and Agro cases primarily.

Q Anything else? Any other cases?

A Not specifically, just other cases I was investigating that I planned to write about in the future, which my investigation is not complete of, but based on my incomplete investigation I think that is additional impetus for the judgment or what a judgment is primarily based on these four cases.

Q I'm asking you now, did you have any

other cases in mind on which you based such statement at the time when you wrote it?

A Not specifically.

* * *

APPENDIX DD

PRE-TRIAL DEPOSITION OF JACK NEWFIELD IN THIS ACTION

PAGES 4 - 5

Q You were the author of this book, entitled, CRUEL AND INHUMAN JUSTICE, published by Holt, Rinehart and Winston, is that correct?

A That's correct.

Q This book is actually a compilation of articles previously written by you and published by you in The Village Voice?

A Yes, that is true.

* * *

PAGES 7 - 9

Q We have a published printed book, when was it decided that it would come out in the form that it is in?

A Late '72 or early '73

Q Can you pinpoint it any closer than that?

A I don't remember.

Q In connection with that did you give Miss Wood or anybody at Holt copies of these articles?

A Yes, when a decision was made to make the book a collection I submitted to my editor all of the court and prison articles I had written over the previous couple of years.

Q What about the articles in the second part of the book about the courts?

A I said court and prison articles.

Q What time are you referring to now in March or later?

A In early '73 when we decided to proceed with the form of the collection.

Q Did you give anyone at Holt, Miss Wood or anybody else a copy of the complaint in the prior action of Judge Rinaldi against The Village Voice?

A I informed her that when the suit was filed, I believe, in May, I showed her the article in the New York Times.

Q Did you give her a copy of any of the papers in the action, a copy of the complaint?

A I don't think so.

Q Did you give her or anybody at Holt a copy of the examination before trial of Judge Rinaldi in that case?

A No, I know I gave her the Times article and told her of the situation and gave her Victor's phone number if she had any further questions she should confer with Victor.

Q When the defendant, Holt, said in

his answers, that they, in paragraph 19 of the answers of the defendant refers to the, "There is sworn testimony in that action," you do not know where they got a copy --

MR. KOVNER: I would like my client to have a chance to read it before he answers the question. He doesn't have it before him.

Q --of Judge Rinaldi's testimony in that pre-trial action?

A I did not give that to him. The only thing I gave Holt was the New York Times clipping about the filing of the suit.

Q Did you in any way discuss that action with Miss Wood or anybody else at Holt?

A I informed them of it and told them that Victor Kovner was my lawyer and if there were any complicated legal questions they should get in contact with Mr. Kovner.

* * *

PAGE 11

Q When was it decided on what should go in?

A By the summer, fall of '73,I think.

Q Then the manuscript was typed up, is that correct?

A Right, and we went over it and if

she had any questions I would have to convince her that it was right. She was a professional editor.

* * *

PAGES 15 - 16

Q Did you read the transcript of Judge Rinaldi's examination before trial in that action?

A I think I skimmed it. I didn't read it closely.

Q When did you skim it or look at it?

A I don't remember.

Q Do you recall in that examination that Mr. Kovner requested the plaintiff to produce the minutes of the transcript in the Burton case?

A I think I remember that. I remember that fact.

Q Did you read the minutes in the Burton case at that time?

A Yes

Q Do you remember the plaintiff being asked to produce the minutes in the Glover case at that time?

A Yes.

Q Did you read the minutes in the Glover case at that time?

A Yes.

Q Do you remember the plaintiff being

asked to produce the minutes in the Vario case at that time?

A Yes.

Q Did you read the minutes in the Vario case at that time?

A I looked at them at sometime in the summer, but I don't remember when.

Q Do you remember the plaintiff being asked about the Agro case at that time?

A Yes.

Q Did you read the minutes in the Agro case?

A I think so.

* * *

PAGES 32 - 34

Q Will you read the first paragraph, please, where it says, "Dominic Rinaldi."

A "Rinaldi is very tough on long haired attorneys and black defendants, especially on questions of bail, probation and sentencing, but his judical temper softens remarkably for heroin dealers and organized crime members."

* * *

Q What heroin dealers were you referring to?

A The ones particularly that I had in mind were Burton, who was a heroin dealer, Glover and Agro who were involved in the

distribution of narcotics.

Q Where did you get the information?

A From the Joint Legislative Committee On Crime.

Q Who specifically?

A Jerry McKenna.

Q You say you had no other heroin dealers in mind when you wrote this?

A I had the report of the Joint Legislative Committee On Crime which showed that when they had a public hearing in June of '72, they went through the Glover case at some length at a public hearing.

* * *

PAGE 40

Q Have you seen the Brooklyn Bar Association report with respect to Judge Rinaldi?

A The one that Mr. Kass composed?

Q Yes.

A I read it at the time, but it was so riddled with errors, I threw it away.

Q When did you read it, when you say, "at the time"?

A It was prepared in 1972 and I was not interviewed. I was not permitted --

Q I am asking you.

A I'm telling you I was not interviewed in preparation for that report. I was not given a copy. I had to get it through

a friend of mine in the Brooklyn Bar Association.

Q When was that that you got it?

A I would say some time in 1973.

Q When in 1973?

A I don't remember.

* * *

PAGE 46

Q But you saw this report in '73, you said?

A Yes.

Q That was before the book was published, long before, is that correct?

A Yes.

* * *

PAGES 49 - 53

Q Mr. Newfield, have you seen the report of the Association of the Bar of the City of New York dated June 8, 1973?

A I read it.

Q With respect to Judge Rinaldi?

A Yes.

Q When did you read it?

A Months ago.

Q When did you get a copy of the report?

A About nine months ago, I think.

MR. KOVNER: Wasn't it at the time that it was released in the New York Times?

THE WITNESS: Yes.

MR. KOVNER: I think that is April of '74.

THE WITNESS: That is about nine months ago.

Q No, this Committee of the Association of the Bar did interview you, is that correct?

A Correct.

Q Do you recall the date?

A No.

Q If the report says it was December 28,1972, would you question that?

A That sounds right.

Q You went there with your attorney, Martin Garbus, is that correct?

A Correct.

* * *

Did you tell them anything about the Burton Case that wasn't already in your articles?

A I don't remember.

Q But, in any event, you remember they discussed the Burton case with you, is that correct?

A Yes.

* * *

PAGES 64 - 66

Q Turn to page 103. Do you see the second full paragraph on that page "So,

what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. Glover was not an addict, but a business man."

When this book was published, you were aware that Glover was under a five-year Federal sentence, is that correct?

A Correct.

Q He was taken right from Judge Rinaldi's Court to Federal jail, is that correct?

A Correct.

Q Tell me how he was putting Glover on the street?

A I think that previous sentence also referred to Mr. Burton.

Q But you mention Glover's name right after it.

A But I think I had Burton in mind when I wrote it.

Q You mention Glover's name but you meant Burton?

A "He is putting people."

Q And Burton is only one. Who are the others? You mention the name Glover. Were you referring to Glover?

A I couldn't have been.

Q Why couldn't you have been?

A Because I knew he was going to the

Federal Penitentiary.

Q At the time you wrote the original article in the Village Voice?

A No. At the time I knew that the book went to the printers.

Q But you didn't state in the book, you didn't change it that Glover wasn't put on the street. He went to the Federal jail, did you state that in the book?

A No, I didn't.

Mr.KOVNER: I would like to go off the record for a moment and consult with our client.

(Discussion off the record.)

MR. KOVNER: Did you want to add anything on the reference, for instance, "Glover was not an addict but a business man"?

THE WITNESS: One is that the part of the sentence where it says --

Q What page?

A The same page 103. The sentence we were discussing, where it says, "sells death for a profit," that was a reference to Glover, whereas the other part of the sentence was more oriented towards Burton and the other sentence where I say he was putting people on the street, that was, you know,

a literary allusion in that he did not get jail time for that sentence. In a sense, he was putting him on the street because he was going to get to the street quicker.

Q This was an answer you gave just after having conferred with counsel,correct?

A Correct.

* * *

PAGES 67 - 70

Q Now, in the next paragraph you say that the judge who did that was Dominic Rinaldi. " I spent the next several weeks carefully analyzing records of Judge Rinaldi's previous dispositions."

You say the next several weeks after you spoke to David and Santise in the summer of '72?

A Correct.

Q How many weeks did you spend analyzing the records?

A Wherever I was able to find records.

Q When you say, "carefully analyzing records of Judge Rinaldi's previous dispositions," that referred to Court records?

A No, it refers to the files at the Joint Legislative Committee On Crime.

Q Not to the Court records themselves?

A No. To the records that the Joint Legislative Committee had compiled based on --

Q My question is, did you examine any of the Court records with respect to any of these cases?

A I didnot actually go to the courthouse. I went to the Joint Legislative Committee On Crime which had been studying Judge Rinaldi's records and had pulled the cases which they thought were the most suspicious.

Q What cases are those? Are those the cases on this sheet?

A Some of those, yes.

Q What other cases besides those? When I say, "this sheet," I mean --

A They certainly had a lot of material on the Glover case since they had had a public hearing in June of '72.

Q Any other cases?

A And they had some material on the Agro case.

Q Any others?

A They also -- not specific cases but they had patterns of dispositions, numbers of cases involving organized crime and narcotics where patterns of dispositions were being analyzed.

Q When did you examine these records of the Joint Legislative Committee On Crime?

A During September of '72.

Q How long did it take you?

A I don't remember.

Q You just read their records, is that correct, that they had?

A I went there on a couple of afternoons and read through their files.

Q And what you say in the book "I spent the next several weeks carefully analyzing records of Judge Rinaldi's previous dispositions?

A Yes

Q That took you several weeks to go to the Joint Legislative Committee?

A I would go one afternoon. I was working on other stories at the time. I would go one Tuesday and go back the following Monday and then the following Friday.

Q But you never went to Court to check the records of any of these cases in the Court files, is that correct?

A Correct.

Q Which would include the stenographer's minutes of what transpired in these cases:

A Correct.

Q You never looked at those?

A Correct.

* * *

PAGE 72

Q Did Hynes give you any specific cases of Judge Rinaldi's?

A No. I don't recall him giving me any specific cases.

Q In any event, you never went to check any case that Hynes may have given you?

A Correct.

Q I am talking about in the Court records, checking the Court records. Your answer is, "Correct"?

A Correct.

* * *

PAGES 74 - 75

Q So,the entire basis of your statement about he is probably corrupt, is the indictment and nothing else?

A The indictment was a public record then.

Q If not for the indictment, do you have any evidence of any corruption?

A No. It was based totally on the fact that he had been indicted by Nadjari and the Grand Jury.

* * *

PAGES 78 - 83

Q Those two pages are a list of the cases that you got from Jerome McKenna, is that correct?

A Yes.

Q Aside from the fact they are on this page, you made no independent search of the Court records with respect to those cases?

A No. But the people that compiled that list did go through the Court records. They worked on the Joint Legislative Committee staff.

Q What did they tell you about those cases that was in the Court records?

A What did who tell me?

Q McKenna or these people you are talking about.

A They were part of the study involving leniency towards organized crime.

Q What did they tell you about those cases?

A I don't remember.

* * *

Q On page 107 on the second full paragraph on that page which says, "I had the naive expectation that Sam Rabin, the presiding justice for the second department might call me." It says, "The articles

had stirred up considerable public interest. I had personally received more than seventy-five letters."

* * *

Q The next paragraph, "When Rabin did not call me, I called him once, twice, three times, the fourth time. He would never call back."

Then skip the next sentence because that really is not relevant, "But Sam Rabin was busy for three weeks. I wanted to show the evidence, the official Court transcipts, to Rabin."

What official Court transcripts were you referring to?

A By this time, November of '73, we had the Court transcripts on Agro, Vario, Burton and Glover.

Q Those were the transcripts you were referring to?

A Plus if I had gotten the appointment with Mr. Rabin, I would have gotten the transcripts on all thos Mafia cases plus other cases I had heard about, but I hadn't written about yet.

Q But without the appointment with Judge Rabin, you did not examine these records, is that correct?

A Correct.

Q Now you say further down that "Judge Rabin told mutual acquaintances I was wrong and irresponsible and he would not dignify my yellow journalism with an interview."

Do you see that?

A Correct.

Q Have you seen the pre-trial testimony of Judge Rinaldi in this case, have you read it, that was taken?

MR. KOVNER: He hasn't seen it.

Q Did Mr. Kovner tell you what Judge Rinaldi testified to?

MR. KOVNER: I object.

MR. WILPON: I want to know whether he knows anything about Judge Rinaldi's testimony.

MR. KOVNER: He hasn't read the transcripts in this case which are voluminous. If there has been any offhand remark, I would object to it. I haven't gone over Judge Rinaldi's testimony with Mr. Newfield in this case.

Q So, you are not aware that Judge Rinaldi testified on his pre-trial disposition, that after the first article about the Burton case was written in August, August, of 1972, which wrote about the

Burton and Glover cases, that Rinaldi himself sent the Court transcripts of those two cases to Judge Rabin? You are not aware of that?

A No.

Q So, when you hear it from me, you are hearing about it for the first time, is that correct?

A I think so, yes.

Q Now you know that when you were calling Judge Rabin, he had already read the transcripts in those two cases?

A I know they were sent to him. I don't know whether for a fact he read them.

Q You don't know whether he read them?

A No.

Q When he told your acquaintances that you were wrong and irresponsible, it might have been based on his reading of the records in those two cases?

MR. KOVNER: I object to a hypothetical question like that.

* * *

APPENDIX EE

PRE-TRIAL DEPOSITION OF MARION WOOD

IN ACTION

PAGE 5

* * *

Q Were you a regular reader of the articles, magazine articles, written by Jack Newfield?

A Of his articles and books, yes.

Q Did you read his articles in "The Village Voice, regularly?

A Yes.

Q Had you read the articles which were republished in the book "Cruel and Unusual Justice," at the time they were originally written?

A Yes

Q Does that include the article in the "New York Magazine"?

A Yes, it does.

Q Did you read the article by Nicholas Gage in "The New York Times," which was referred to by Jack Newfield?

A Not at the time of the publication of the article.

Q When did you first read it?

A At a later date. I don't know the date.

* * *

PAGE 8

Q Now, when did you conceive the idea of including the articles under the heading, "Courts"?

A When I returned from my September holiday, which would have been early in October of 1972.

* * *

PAGES 9 - 11

Q Now, what about the other articles; specifically, the article about "The Politics of Justice," "Suspicious Cases," and "The Life and Hard Times of Aaron Koota," which appeared in "The Village Voice"; did you have discussions with him about those?

A Yes.

Q When was that?

A All throughout the period he was writing them.

Q Did you see these articles before they were published in "The Village Voice"? Did he show them to you?

A I didn't see the actual articles before they were published, the written article, in each case.

Q But you saw them when they were published in " The Village Voice?

A Yes.

Q In the meantime, in respect to the prior articles, you had already agreed to publish the book with those articles?

A The book was being shaped at this point. These articles were slated for inclusion, yes.

Q Then you subsequently included the other articles?

A Yes.

Q Now, when did the proposed book in final form come to a head; when did you get the whole thing going?

A The last article that was included was in March of 1973, and was an article on the City marshals. It is the final piece in the book.

* * *

Q When did they come in?

A The edited manuscript was vetted by the author and myself in late May of 1973.

* * *

PAGE 16

Q Are there any interoffice memorandum with respect to these discussions or meetings?

A No. The only thing I have here are schedules of production; memos at the time

of publication where Jack would appear on radio and television; that sort of thing.

Q Do you have those memos here?

A They are in my file.

THE WITNESS: Do you want me to go through that and pull those?

MR. ELDRIDGE: Off the record.

(Discussion off the record.)

(Various documents from the file of the witness marked Plaintiff's Exhibits 4-A through 4-T for identification, as of this date.)

* * *

PAGE 18

Q Tell us what the manuscript went through?

A The manuscript went through substantive editing. That's my job. That was the end of March when I got it back from the typist.

Q Please state the year.

A "73

It then went for what I mentioned, naturally, the spelling corrections, that sort of thing. That would have been in April. It also went to the designer. I believe we settled the title at that time. The jacket was ordered. And in late May,

Jack came in and worked over the final manuscript.

Q Newfield?

A Yes, May of '73, as it was to go to the compositor, although it was not the final manuscript as it appeared. There were changes. It then went for typesetting in August.

Q August 1973?

A 1973. I believe in September of '73 the galleys came in. The master set of galleys went to the proofreader. The author's set went to the author.

* * *

PAGES 28 - 31

Q Turn to Page 108.

Do you see the reference there to a report by the Brooklyn Bar Association?

A Yes I do.

Q This is part of the postscript which commenced on Page 104.

A That's right.

Q When did you receive this postscript from Jack Newfield?

A In November of 1973.

Q Did you ask Jack Newfield for the copy of the Brooklyn Bar Association report that he referred to on Page 108?

A He refers to it by saying he couldn't get a copy.

Q Do you see where he quotes from it, Page 108, that he makes direct quotes from it?

A That's correct.

Q He said he made these quotes without a copy?

A I was not sent a copy of the report. I heard about it.

I was told the report clearing Rinaldi was"confidential."

Q Newfield told you he never got a copy of the report at this time?

A That's correct.

Q Are you aware that there was also a report by the Association of the --

A Of the Bar of the City of New York. April 8, 1974 was the first new report of it, the first break of the story.

Q Was that the first time you were aware of it?

A No. I was aware of it before that.

Q When did you first become aware of it?

A I was aware at the time the City Bar had convened a committee. At the time the articles -- or soon thereafter; the articles appeared in October, I believe of '72. It was rumored a report existed; right throughout the following year.

Q Rumored by who?

A I would have to say Jack, in effect, but anybody who read the paper. It was never released. It was rumored that the report was available, but, I believe, six months before it was broken -- and it was broken by a "Daily News" reporter, who got ahold of a copy.

Q Did you also hear rumors about the contents of the report?

A No.

Q Did Jack Newfield tell you that he had been interviewed by the Committee of the Association of the Bar --

A Yes.

Q -- On December 28, 1972?

A I don't know the date of that. I cannot remember that.

Q When did he tell you that he had been interviewed?

A I can't remember. It could have been around that time.

Q Did he tell you what the contents of that interview was?

A If I were to take -- I really would be fishing.

MR. ELDRIDGE: He just wants to know whether you remember any conversation with Jack that told of his interview with members of the Bar Association of the City Bar of New York.

A I don't remember anything specifically.

Q But you know he had been interviewed?

A Yes.

Q And you obviously knew that from him?

A That's correct.

Q Will you please turn to Page 105 of the book? Do you see the next to the last paragraph on that page in which it says,"I spent the next several weeks carefully analyzing records of Judge Rinaldi's dispositions"? Do you see that?

A Yes, I do.

Q Did you ask Jack Newfield what records he was referring to?

A Not specifically.

Q Did you ask him to see any of the material that he claimed to have dug up?

A No, I did not.

* * *

PAGES 40 - 41

Q There's a sentence there, "I want to show the evidence, the official court transcript, to Rabin."

A Right.

Q Did he tell you what official court transcript he was referring to?

A Specifically, no.

Q Did he show you any transcripts?

A No.

* * *

APPENDIX FF

AFFIDAVIT OF MARION WOOD IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * *

54. At another of these weekly meetings sometime in December 1972, Mr. Newfield mentioned to me that he had been asked to appear before a committee of the Association of the Bar of the City of New York (hereafter "City Bar") which had been formed to look into the charges he had made in the "Ten Worst ..." article. Early in 1973 he again raised the subject, telling me that he and a lawyer had appeared before the committee and that he had answered some questions about the article.

* * *

57. After the pasted-down articles had been sent to the typist, Mr. Newfield informed me that Justice Rinaldi had filed suit against The Voice for invasion of privacy and libe. He told me that the suit had arisen out of an editorial advertisement which The Voice had placed in a New York Times Sunday Book Review supplement which had referred to Mr. Newfield's previously published article "Justice Gets

a Fix" which had criticized Justice Rinaldi for his handling of the Burton case. The author informed me that the suit was based on the advertisement and not on the Voice articles themselves, and thereupon volunteered to me the name and telephone number of the attorney for The Voice in the Scali lawsuit, Victor A. Kovner, Esq., so that I could call him in case I had any questions regarding this lawsuit.

* * *

74. On the basis of all the foregoing information, I agreed with Mr. Newfield that the publishing date for CUJ should be postponed from the Fall of 1973 to the Spring of 1974 in order to give him sufficient time to incorporate into the proposed postscripts to "Justice Gets a Fix" (and at other relevant points in the book) any new information the author could secure from the then secret City and Brooklyn Bar Association reports, the interview he hoped to have with Judge Rabin and his anticipated meeting with Meade Esposito. Accordingly, I placed CUJ on Holt's Spring 1974 list of publications.

75. Throughout June and July Mr. Newfield telephoned me on several occasions to appraise me of his progress in pur-

suing the sources of new information I've just now mentioned. It is my best recollection that the ultimate result of each was as follows:

a.) City Bar Report on "10 Worst.."

It was not until April 8, 1974 that the Bar Association's report on "10 Worst..." was disclosed to the public. Mr. Newfield told me that disclosure would not have occurred even then had not reporter Sam Roberts of the New York Daily News secured a copy from a confidential source in the Association. My recollection of the consequences of the disclosure of the report is as follows: First, I recall reading New York Times and Daily News articles on the disclosure which I recall reported that Mr. Newfield's criticisms of four of the "10 Worst..." were well-founded, but that he had "not substantiated" his charges against Judge Rinaldi. Second, after the City Bar Report had been disclosed and

he had obtained a copy of it, the author told me that the Report had not disputed the truth of the facts he had stated, but stated that he had not included in the article a few material facts bearing on the Rinaldi dispositions the author had investigated and criticized and had not"substantiated" his opinions regarding Justice Rinaldi's alleged incompetence and bias. I think it is important to understand that the public disclosure of the City Bar Report followed the initial public sale of "Cruel and Unusual Justice"by roughly three weeks. Although the official publication date of the book was April 15,1974, bookstores received copies for retail sale sometime during the period of May 16-18,1974. All I knew about this Report prior to the publication of CUJ was what Jack Newfield had told me: That it existed and he was sure it would support his charges against "The Ten Worst...".

Since the commencement of this lawsuit I have received copies of the Times and Daily News articles announcing the disclosure of the City Bar Report and have attached each as an exhibit to this affidavit (Exhibits 7 and 8, respectively). To this date I have not, however, seen a copy of this Report.

B.) Brooklyn Bar Association Report

The thrust of this report, according to the author's statements to me, was that Jack Newfield had reported the facts accurately, but that he had excluded other material facts that were favorable to Justice Rinaldi. Like the City Bar Report, I have never seen a copy of this document. Thus prior to the publication of CUJ,my knowledge of its content was limited to what the author had told me about it after a lawyer friend of his in Brooklyn secured a copy of it for him.

* * *

79. All "style" corrections were initially made by me and then approved by the author. Mr. Newfield made all the substantive corrections, telephoned them in to me or to Miss Chapman and I incorporated them in the master copy of the typed manuscript [e.g., in "Justice Gets a Fix", Exhibit 6, p. 6, the text originally read "so what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit." Mr. Newfield called and told me to insert the phrase "(Glover, remember, was not an addict but a businessman") at the end of the above sentence, explaining, as I recall, that he wanted to indicate a specific example of Justice Rinaldi's disposition of the case of a non-addict defendant; one who "sells death for a profit"]

* * *

80 The completely proofed and edited typed manuscript was held in my office for nearly the entire month of August,1973 while the author was on vacation. Upon his return during the last week of August, I sent the manuscript to Holt's Production Department for typesetting and printing of the first galleys of the book. On October 12, 1973, three sets of the galleys of CUJ were delivered to my office.

* * *

APPENDIX GG

REPLY AFFIDAVIT OF MARION WOOD

* * *

3. I have never read my employer's answer in this case and thus I have no knowledge of what I may or may not admit.

* * *

5. In paragraph 22 of his affidavit, Justice Rinaldi again claims that even though I "knew" that the Scali suit disputed the truth of the Voice articles, I caused CUJ to be published. I knew no such thing. I have never in my life seen a copy of the New York Times article of May 16, 1973 referred to therein and attached to Justice Rinaldi's affidavit as "Exhibit 2". The only New York Times article Mr. Newfield gave me -- and, indeed, the only Times article pertaining to plaintiff I read prior to the commencement of this action -- is the Nicholas Gage article of September 25, 1972 (Exhibit 5 to my original affidavit). The article of April 9, 1974 which reported on the disclosure of the City Bar Association's report on "The Ten Worst Judges ..." article previously published in New York Magazine in October of 1972 (Exhibit 7 to my original affidavit), I did not see until this suit started.

* * *

13. In the first place, I have never seen a copy of the Brooklyn Bar Association report; all that I've ever known of it I learned from Jack Newfield's characterizations of it expressed to me prior to his seeing a copy of it (see my original affidavit, par. 72, p. 33) and after he had secured access to a copy through a friend of his (ibid., par. 75b, p. 37

* * *

APPENDIX HH

ARTICLE IN THE NEW YORK TIMES, WEDNESDAY MAY 16, 1973

JUSTICE RINALDI AND A PUBLISHER SUE THE VILLAGE VOICE

BY C.GERALD FRASER

Two persons who said they had been linked to the Mafia by The Village Voice have filed separate libel suits against the Greenwich Village weekly, asking for a total of $10-million.

In one action, filed yesterday, State Supreme Court Justice Dominic S. Rinaldi sought $6-million, charging that The Voice had maliciously depicted him in an advertisement last Feb. 25 as "corrupt, venal, biased, incompetent and unqualified."

* * *

Justice Rinaldi's suit was based on a full-page advertisement for The Village Voice in The New York Times. The Times was not listed as a defendant in Justice Rinaldi's suit. In the advertisement, a photocopy of which was attached to Justice Rinaldi's complaint, a headline in large type said:

"The judge bawled out the cop. And let the pusher go free."

The advertisement also contained a full-length sketch of the judge in robes.

Justice Rinaldi said the advertisement "meant and intended to mean that [he] was and is a corrupt, venal, biased,incompetent and unqualified justice...who should be criminally indicted and impeached and removed from office."

The Village Voice articles on which the advertisement was based asserted that Justice Rinaldi had a reputation for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers."

The Voice also said that the judge's "judicial temper softens before big heroin dealers and organized crime figures." The term of Justice Rinaldi's $40,833-a-year elective post expires Dec.31,1974.

The Voice's attorney Victor Kovner, said yesterday he expected to "prevail" in the suit by Justice Rinaldi."In the seven or eight years I've been connected with "The Voice" the lawyer said, "we've never paid a dollar on any cause of action."

* * *

APPENDIX I I

LETTERS AND MEMORANDUM OF HOLT RINEHART AND WINSTON, INC., CONCERNING PROMOTION OF THE BOOK

HOLT, RINEHART AND WINSTON, INC.

April 10,1974

Mr. Jack Newfield
250 W.94th Street
New York, New York 10025

Dear Jack:

The following interviews have been set up for you during the next few weeks.

Monday, April 15 --	Due at Sterling Manhattan Cable TV, 120 East 23rd Street at 3:30 pm, for an interview with Jack Nessell.
Tuesday, April 16 --	Due at WMCA radio,888 Seventh Avenue (entrance on 57th Street) at 9:45 pm,for an interview on the Barry Gray Show.
Monday, April 22 --	Due at WOR radio, 1440 Broadway at 1:00 pm, for an interview with Arlene Francis.
Thursday, May 2 --	Live interview with Jim Hartz, for the WNBC-TV 6 O'Clock News. Details to come.

I'm arranging more interviews, and will let you know the details as soon as possible If you have any questions please give me a

call.

Sincerely,

Bonnie Ammer
Publicity

cc: J. Taylor
K. Mender
M. Wood

April 11,1974

MEMORANDUM TO: T. Wallace
W. Tribe
R. Passoff
R. Richter (12)
I. Heldman
D. Hutter
M. Wood
N. Chapman
J. Taylor

FROM: Publicity ABOUT:Author Appearances

CRUEL AND UNUSUAL JUSTICE

The following interviews have been arranged for Jack Newfield in New York: appearance on A.M. New York (WABC-TV) on Monday, April 8; interview on Sterling Manhattan Cable TV on April 15; an appearance on the Barry Gray Show)WMCA Radio) on Tuesday April 16, at 9:45 pm; an interview with Arlene Francis (WOR-Radio) on April 22 at 1:00 pm; a live interview with Jim Hartz for the WNBC-TV 6 O'Clock News on Thursday, May 2.

Jack Newfield will promote his book in Boston on May 15 and/or 16.
He will appear on the Sonya Hamlin Show (WBZ-TV

HOLT, RINEHART AND WINSTON, INC.

MEMORANDUM

TO: RUTH RICHTER
FROM:MARGO MANDER
ABOUT: JACK NEWFIELD: CRUEL AND UNUSUAL JUSTICE

Jack Newfield will promote his book in Boston on May 15 and/or 16.
At the present time he is scheduled for a taping of the Sonya Hamlin Show (WBZ-TV)
As other interviews are arranged I will fill you in with the details.

CC: M. Wood
J. Taylor
B. Ammer

HOLT RINEHART AND WINSTON, INC.

April 17,1974

Mr. Jack Newfield
250 W.94th Street
New York, New York

Dear Jack:

Just a short note to remind you of your interview on Sunday, April 21, 11pm,on WABC radio, 1330 Avenue of the Americas, 8th Floor. You should arrive there around 10:30 pm, and ask for Larry Bear, who will interview you.

Also, Don Swame, from CBS radio, will call you sometime this week to set up an interview with you. I haven't yet received an answer from Pat Collins, but will let you know as soon as possible.

If you have any questions, please give me a call.

Best,

Bonnie Ammer
Publicity

CC: J. TAYLOR
K MENDER
M. WOOD

HOLT, RINEHART AND WINSTON, INC.

MEMORANDUM

4/22/74

TO: Ruth Richter
FROM: Bonnie Ammer
ABOUT: Jack Newfield: CRUEL AND UNUSUAL JUSTICE

Ruthie:

Jack Newfield will be in Chicago on May 9 and 10 to promote his book. While there he will appear on Kup's Show and Cromie's Circle, and will be interviewed by Studs Terkel. I will let you know as soon as possible, what other interviews are set up.

cc: J.Taylor
K.Mender
M.Wood

May 2, 1974

MEMORANDUM TO: I. Goodman
T.Wallace
W.Tribe
R.Passoff
R.Richter (12)
I.Heldman
D.Hutter
M.Wood
J.Josephy
M.Chalken
N.Chapman
J.Taylor

FROM: PUBLICITY ABOUT: AUTHOR APPEARANCES

CRUEL AND UNUSUAL JUSTICE

When in Boston on May 15, Jack Newfield will appear on The Sonya Hamlin Show (WBX-TV) and The Tom Larson Show (WSBK-TV). He will also tape interviews with Wally O'Hara for WBZE Radio and Danny Schecter for WBGN Radio.

Jack will tape an interview for The Tommorrow Show (NBC-TV) on May 23rd. The program will air on Thursday, May 24th.

On May 24th, Jack will visit Chicago to tape Kup's Show (nationally syndicated) and Cromie's Circle (WGN-TV). He will also be interviewed by Studs Terkel.

HOLT, RINEHART AND WINSTON, INC.

May 9, 1974

Mr. Jack Newfield
250 West 94th Street
New York, New York 10025

Dear Jack:

Enclosed you will find air-shuttle tickets for your trip to Boston on Wednesday,May 15th. Your schedule is as follows:

7:00 am — I know it's very early in the morning,but I think it would be a good idea to take the 7:00 am shuttle. It will get you into Boston with enough time for you to catch your breath and have breakfast before your first interview.

9:35 am — Due at WEZE Radio,Arcade Statler Office Building on Park Square,for a taped interview with Wally O'Hara.Wally's number,in case you need to reach him is 542-1717

10:30 am — Due at WSBK-TV,83 Birmingham Parkway,(extension of Soldiers Field Road)for taping of the Don Larson Show.Your contact here is Donna Grant, 783-3838

1:30 pm — Due at WBGN Radio,5005 Prudential Tower, 50th Floor,for a taped interview with Danny Schecter. Danny can be reached at 266-1111.

3:15 pm — Due at WBZ-TV, 1170 Soldiers Field Road, for a taping of The Sonya Hamlin Show. Your contacts here are Penny Rich and Vicky Jones, 254-5670.

I did finally get to speak to Joe Klein this morning. He will not, I'm afraid, be able to do anything with CRUEL AND UNUSUAL JUSTICE for The Real Paper as they are extremely short on space for books these days.

-continued-

He did, however, ask that you be certain to give him a call when you're in town. (492-1650)

If you have any questions, give me a call. Please keep track of all your expenses so that we'll be able to reimburse you.

Have a good trip.

Best,

Karen Mender
Publicity

cc: I. Goodman, T.Wallace, R. Richter, I. Heldman
J. Taylor, B. Ammer

APPENDIX JJ

INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM —
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

-against- INDICTMENT NO.
S.P.O.K.#4-73

DOMINIC S. RINALDI
Defendant

THE EXTRAORDINARY SPECIAL GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE in violation of Section 210.15 of the Penal Law committed in Kings County as follows:

The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a corrupt manner. More specifically, the Grand Jury is investigating to determine whether the defendant has been corruptly influenced in relation to the disposition of a criminal case in Nassau County entitled People v. Gomes, et al. Of interest to the Grand Jury was whether the defendant had been criminally influenced to seek a lesser plea for the defendants or had been influenced wrongfully to impose a lenient sentence in the Gomes case.

Evidence before the Grand Jury established that the defendant was the Supreme Court Justice who accepted the guilty plea and who imposed sentence in People v. Gomes, et al. The testimony before the Grand Jury also revealed that the District Attorney's Office insisted that the defendants in that case plead guilty to a felony or go to trial in order to dispose of the indictment against them.

Evidence before the Grand Jury disclosed that the defendant had approached the District Attorney in an effort to obtain a substantial benefit for the defendants in the case. The defendant--according to the proof -- had personally visited the District Attorney of Nassau County in connection with an effort to have the District Attorney grant a misdemeanor plea to the defendants rather than the more serious felony plea on which the District Attorney had insisted.

In addition, evidence before the Grand Jury also showed that the defendant admitted that he had learned that a friend of his had offered to "fix" the case and that his friend had made representations that the defendant would give suspended sentences to Gomes and his accomplices — that is, the defendant would "walk them out." None of this information was placed upon the official record in the Gomes case.

Thereafter, according to evidence, Gomes and his accomplices each pleaded guilty to one felony and

one misdemeanor in full satisfaction of the twenty-four felony count indictment. The defendant then suspended sentences on the felony and imposed sentences of six and nine months on the misdemeanor.

Accordingly, it became material and necessary for the Grand Jury to question the defendant concerning his attempt to obtain a misdemeanor plea for the defendants.

On September 16 and October 18, 1973 the defendand appeared before the Grand Jury, was duly sworn and gave testimony concerning the Grand Jury's investigation.

Whereupon on September 14, 1973, the defendant swore falsely when he testified that he never personally intervened with the District Attorney in order to obtain a misdemeanor plea for the defendants in the Gomes case.

Whereas, in truth and in fact, the defendant did personally intervene with the District Attorney in order to obtain a misdemeanor plea for the defendants in the Gomes case.

The testimony was to a material matter, in that the defendant's efforts on behalf of Gomes and his accomplices would tend to support the allegation, being investigated by this Grand Jury, that the defendant was part of a corrupt scheme to obtain a lesser plea and a lenient sentence in the case.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this indictment

accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE in violation of Section 210.15 of the Penal Law committed in Kings County as follows:

The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a corrupt manner. More specifically, the Grand Jury is investigating to determine whether the defendant has been corruptly influenced in relation to the disposition of a criminal case in Nassau County entitled People v. Gomes, et al. Of interest to the Grand Jury was whether the defendant had been criminally influenced to seek a lesser plea for the defendants or had been influenced wrongfully to impose a lenient sentence in the Gomes case.

Evidence before the Grand Jury establishes that the defendant was the Supreme Court Justice who accepted the guilty plea and imposed sentence in People v. Gomes, et al. The testimony before the Grand Jury revealed that the District Attorney's Office insisted that the defendants in that case plead guilty to a felony or go to trial in order to dispose of the indictment against them.

Evidence before the Grand Jury disclosed that the defendant had approached the District Attorney in an effort to obtain a substantial benefit for the defendants in the case. The defendant -- according to the proof -- had personally visited the

District Attorney of Nassau County in connection with an effort to have the District Attorney grant a misdemeanor plea to the defendants rather than the more serious felony plea on which the District Attorney had insisted.

In addition, evidence before the Grand Jury also showed that the defendant admitted that he had learned that a friend of his had offered to "fix" the case and this his friend had made representations that the defendant would give suspended sentences to Gomes and his accomplices — that is, the defendant would "walk them out." None of this information was placed upon the official record in the Gomes case.

Thereafter, according to evidence, Gomes and his accomplices each pleaded guilty to one felony and one misdemeanor in full satisfaction of the twenty-four felony count indictment. The defendant then suspended sentences on the felony and imposed sentences of six and nine months on the misdemeanor.

Accordingly, it became material and necessary for the Grand Jury to question the defendant concerning what actions, if any, he took once he learned that a friend of his had represented that the case before him could be fixed.

On September 16 and October 18, 1973, the defendant appeared before the Grand Jury, was duly sworn and gave testimony concerning the Grand Jury's investigation.

Whereupon, on September 14, 1973, the defendant swore falsely when he testified that he reported the "fix" representation to Assistant District Attorney Henry Devine.

Whereas in truth and in fact the defendant did not report the "fix" representation to Assistant District Attorney Devine.

The testimony was to a material matter in that, if true, it would have tendered to show that the defendant was not involved in a bribe attempt.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this indictment accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE in violation of Section 210.15 of the Penal Law committed in Kings County as follows:

The Grand Jury has been conducting an investigation to determine whether the defendant,a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a corrupt manner. More specifically, the Grand Jury has been investigating to determine whether the defendant had corruptly influenced the disposition of a criminal case in Kings County entitled People v. McCauley. Of interest to the Grand Jury was whether the defendant had been part of a scheme to unlawfully reduce McCauley's sentence on the basis of a forged document submitted to the Court.

Evidence before the Grand Jury established that the defendant was the Justice of the Supreme Court

in March of 1973, who presided over an application in a criminal case entitled People v. McCauley. In this application, McCauley contended that in 1964 when he had been originally sentenced in the matter before the court, he had been convicted of only two prior felonies rather than three, as the record reflected at that time. McCauley further contended that his position entitled him to be resentenced.

The proof before the Grand Jury also showed that McCauley's application was predicated on a false document which reflected that a prior conviction was in fact for a misdemeanor, and not for a felony as the records before the court in 1964 originally reflected.

Evidence before the Grand Jury further disclosed that the defendant advised the Assistant District Attorneys who were prosecuting the cases that he would impose the same sentence on McCauley as he had imposed in 1964, regardless of whether the prior conviction in question was a felony or a misdemeanor.

After, the defendant's representation, the Assistant District Attorney consented to the resentencing of McCauley without thoroughly checking the authenticity of the false document.

The proof before the Grand Jury then reflected that the defendant -- contrary to his prior representations -- resentenced McCauley and reduced the original sentence to six to fourteen years in state prison to a sentence of five to ten years. At the

time of resentence,McCauley, had already served nearly ten years in state prison.

It, therefore became material and necessary for the Grand Jury to question the defendant concerning his representations about the resentencing of McCauley.

On September 14, 1973, and October 18, 1973, the defendant appeared before the Grand Jury, was duly sworn, and testified concerning the Grand Jury's investigation.

Whereupon on September 14, 1973, the defendant swore falsely when he testified that he had never told anyone that he would sentence McCauley to the same prison term, regardles of the merits of McCauley's claim that he had only two prior felony convictions, rather than three.

Whereas, in truth and in fact, the defendant had told the Assistant District Attorneys assigned to the case that he would sentence McCauley to the same prison term, regardless of the merits of his claim.

The defendant's false testimony was to a material matter in that the truth would have tended to establish whether the defendant was a party to a corrupt scheme to obtain a reduced sentence for McCauley for utilizing a forged document.

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this indictment, accuses the defendant of the crime of OBSTRUCT-

ING GOVERNMENTAL ADMINISTRATION in violation of Section 195.05 of the Penal Law committed as follows:

The defendant, in the County of Kings, State of New York, on or about the 14th day of September,1973 did intentionally obstruct, impair and pervert the administration of law and the functioning of a government agency by means of an independently unlawful act.

The defendant, by committing the crimes of perjury as a witness before the Extraordinary Special Grand Jury of the County of Kings did obstruct, impair and pervert the Grand Jury's investigation into corruption in the criminal justice system.

A TRUE BILL

MAURICE H. NADJARI
DEPUTY ATTORNEY GENERAL

FOREMAN
November 1973 Grand Jury

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

v.

HOLT, RINEHART & WINSTON, INC. and JACK NEWFIELD,

Respondents.

BRIEF FOR RESPONDENT HOLT, RINEHART & WINSTON, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CARLETON G. ELDRIDGE, JR.
200 Park Avenue
New York, New York 10017

On the Brief:
JOHN M. KEENE, III
JERRY SLATER

November 7, 1977

INDEX

Citations

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DOMINIC S. RINALDI,

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against

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Respondents.

BRIEF FOR RESPONDENT HOLT, RINEHART & WINSTON, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Holt, Rinehart & Winston, Inc. (hereinafter "Holt") respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the judgment entered in this case on July 14, 1977 by the Court of Appeals of the State of New York.

The following abbreviations will be used in respondent Holt's brief:

Pb- —petitioner's brief.

A- —petitioner's appendix.

R- —respondents' joint appendix on appeal in the Court of Appeals of the State of New York.

Jurisdiction

Petitioner has failed to demonstrate that the Court possesses jurisdiction to review the judgment of the New York State Court of Appeals under 28 U.S.C. § 1257(3).

While it is true that five of the six questions presented for review refer to the Court of Appeals' consideration of issues arising under the First Amendment to the United States Constitution and interpretive decisions of this Court, these questions clearly are not sufficiently substantial to satisfy the jurisdictional requirement.

Question "1." does not present a substantial federal question because the Court of Appeals correctly held that petitioner failed to fulfill his summary judgment burden under state law by omitting to present any probative material evidence opposing the motion on the dispositive issue of Holt's alleged actual malice in publishing *Cruel and Unusual Justice* (hereinafter referred to as *"CUJ"*), (A-29, 30).

Nor do Questions "2." and "3." arise to the level of substantial federal questions. The Court of Appeals' careful analysis of the evidence compelled the findings that petitioner failed to present any probative, material evidence tending to establish the falsity of the charges of "probable corruption" and "suspicious leniency", thus requiring dismissal of the complaint under state summary judgment law. These questions were, moreover, mooted for review purposes here by the Court of Appeals' dispostive ruling that petitioner failed to present any probative, material evidence that Holt published *CUJ* with actual malice.

"Question "4." does not present a substantial federal question because the Court of Appeals' ruling that opinions and not factual omissions are at the root of the action did

not turn on an interpretation and application of *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), but rather on the Court of Appeals' own state law-based decision in *James* v. *Gannett Co.,* 40 N.Y. 2d 415, 424 (1976) that relatively minor omissions from an otherwise basically accurate publication do not create liability.

Questions "5." and "6." do not even present federal questions because neither was considered nor decided by the Court of Appeals. They are further removed from the level of substantiality required to invest jurisdiction because they are based on petitioner's clearly erroneous premise that the defendant in a public official's libel action carries the burden of establishing the truth of the sued-upon publication. Additionally, question "6." is solely directed to the propriety of the grant of summary judgment to Newfield.

Questions Presented

1. Does the Court of Appeals' dispositive ruling render moot the proposed questions of whether petitioner satisfied his constitutional burdens of presenting some evidence to establish the falsity of the charges of "probable corruption" and "suspicious leniency", and clear and convincing evidence of actual malice?

2. Would the Court of Appeals' judgment nonetheless have been correct had It ruled that "probable corruption" and "suspicious leniency" are pure opinion and thus absolutely privileged?

Statement of the Case and Summary of Argument

The Petition before the Court should be rejected on its face as being in clear violation of Supreme Court Rule 23(4). Petitioner's typewritten reconstruction of parts of the record on appeal below is totally inaccurate in one respect which is both substantial and material (Point I, *infra*). Additionally, petitioner's forty-five pages of argument accomplish no more than to burden the Court with a biased, discursive rehash of the evidentiary record below in an attempt to create the appearance of a question of fact as to Holt's alleged actual malice. The inferences on which petitioner's arguments are based are in many respects substantially misleading due to the fact that they are not based on any evidence in the record but merely on petitioner's groundless suspicions (Point II, *infra*).

The writ should be denied for the further reason that the judgment below has no normative importance which transcends the private interests of the litigants. The judgment turned on the Court of Appeals' analysis of the evidentiary record and application of adequate and independent grounds of state law. The judgment, moreover, neither conflicts with any decision of this Court nor decides a federal question which this Court has not but should itself decide. Furthermore, the dispositive ruling of the judgment below was unquestionably correct under both state and federal constitutional law, thus mooting for review purposes the questions presented by petitioner. Indeed, the challenged rulings would have been correct even if the Court of Appeals had adopted rather than rejected respondents' argument below that "probably corrupt" and "suspiciously lenient" are non-actionable opinions (Point III, *infra*).

REASONS FOR DENYING THE WRIT

I.

Petitioner's Appendix' inaccurate reproduction of a substantial and material fact in the Record on Appeal strongly suggests that the writ should be denied [Rule 23 (4).]

Petitioner, a sitting judge, has conceded and all courts below have held that he is a public figure and therefore, in order to ultimately prevail, must produce evidence of Holt's alleged "actual malice" with convincing clarity. Applicable constitutional standards required him to prove, in other words, that Marian Wood—the Holt editor ultimately responsible for the publication of *CUJ*—permitted the book to reach the stands while harboring actual knowledge that it contained substantial, material and defamatory factual falsehoods of and concerning the petitioner, or while in fact harboring serious doubts as to the truth of such facts. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

One of the "facts" petitioner has consistently touted as evidence of Holt's actual malice* is the public disclosure on April 8, 1974 of a report prepared by a special subcommittee of The Association of the Bar of the City of New York which criticized Newfield's treatment of petitioner in the October 16, 1972 *New York Magazine* article "The Ten Worst Judges in New York" (R-474). The article was later republished in *CUJ* (R-390-391).

Petitioner argued below and reiterates here (Pb-43-44) that since the report was disclosed on April 8, 1974 and

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* Others will be analyzed and their lack of probative merit discussed, *infra*, Point II.

CUJ was "published" on April 15, 1974 (Pb-7), Marian Wood had to have prepublication knowledge of the content of the report, thus creating a jury question as to Holt's alleged actual malice. Marian Wood stated in her affidavit supporting Holt's motion for summary judgment, however, that *CUJ* was *actually* "published" (i.e., the book was "on the stands" for public purchase and reading) as early as March 16-18, 1974—approximately three weeks prior to the disclosure of the City Bar Association's report. She stated further that April 15, 1974 was merely the "official" publication date of the book which Holt had set for office record and publicity purposes, that she did not see a *New York Times* article announcing the report's disclosure until after the commencement of the instant action and that she has never seen a copy of the report itself (R-348-349, 500). Petitioner presented no evidence to rebut these statements.

In petitioner's appendix, however, the date *March* 16-18, 1974 has been inaccurately reproduced in such fashion that a reader unfamiliar with the record would necessarily conclude that *CUJ's* actual publication date *followed* the disclosure of the City Bar report by more than one month:

> ". . . bookstores received copies for retail sale sometime during the period of *May* 16-18, 1974." (A-274; emphasis supplied.)

The extra space following the typewritten word "May" as it appears in petitioner's appendix, coupled with the presence of the letter "y" on a slightly higher horizontal level than the letters "Ma", clearly suggest that in its original version petitioner's appendix did in fact contain "March" instead of "May", but was for some reason altered.

Holt ventures no guess as to the reason or reasons why this substantial and material inaccuracy appears in the appendix presented to the Court. We do, however, respectfully submit that standing alone this serious inaccuracy constitutes a sufficient reason for denying the instant petition under Rule 23 (4).

II.

The writ should be denied because petitioner's questions presented for review and arguments constitute no more than misleading and suspicious inferences unsupported by any evidence in the record.

The Court of Appeals of the State of New York undertook and correctly exercised its clear responsibility under the U.S Constitution. The Court below closely reviewed the evidentiary record in this case in order to determine whether respondents' First Amendment rights had been adequately secured by the lower courts. *Hotchner* v. *Castillo-Puche,* 551 F. 2d 910, 912 (2d Cir. 1976), *cert. denied,* 43 U.S.L.W. 3202 (October 4, 1977). Petitioner has not challenged the Court of Appeals' finding, based on that analysis, that the majority of the sued-upon statements are absolutely-privileged opinions.*

The Court of Appeals' state law-based rulings that petitioner failed to carry his burden of presenting some evidence of Holt's alleged actual malice as to the assertedly "factual" statements that petitioner was "suspiciously lenient" and "probably corrupt" also rest upon that Court's analysis of the evidentiary record and thus for that reason alone should not be reviewed here. *See, United*

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* That the statements sought to be reviewed here also could be correctly viewed to fall within that category will be shown in Point III, *infra.*

States v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918); *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U.S. 430, 433-434 (1917).

Only where a state court judgment has been based on a shockingly wrong analysis of the evidentiary record, thus creating substantial due process questions, has this Court ever deviated from the above-referenced policy of declining to review a state court decision which turned on its own facts and the application of an independent and adequate state law ground.

This is clearly not such a case. *Compare, Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). Petitioner has not and cannot assert a violation of the due process clause of the Fourteenth Amendment because it is he, and not respondents, who had the burden of proof and totally failed to carry it. Furthermore, as Holt will show *infra*, Point III, the dispositive ruling on actual malice was totally correct under the decisions of this Court as well as under the independent and adequate state law ground for its making.

In the event that the Court nonetheless feels that the evidentiary analysis undertaken by the Court of Appeals might have been in error, Holt will demonstrate the contrary by reviewing the more flagrant examples of petitioner's misuse of the record to concoct the inferences of which the questions presented are wholly comprised. In so doing, yet another serious example of petitioner's failure to accurately portray the record as required under Supreme Court Rule 23(4) will be revealed.

In the third and fourth questions presented for review (Pb-3) petitioner asserts, contrary to the record, that respondents have "admitted" that the charge of "suspicious leniency" was based on "four specific cases", insinuating that the record contains no other supportive evidence on which respondents relied. Petitioner's assertion in Question "5." that respondents presented "nothing" on their summary judgment motions to support the charges of "toughness" (etc.) is similarly contrary to the record.

In publishing the charge of "suspicious leniency" respondents also relied on

> (1) Newfield's review of the files prepared by the Joint Committee on Crime of the New York State Legislature containing a review of felony narcotics dispositions by petitioner which the Committee felt warranted scrutiny (R-615-617, 621-624);
>
> (2) That Committee's public hearing at which petitioner's dispositions in felony narcotics cases were criticized (R-329, 426);
>
> (3) A *New York Daily News* article and editorial on the hearing (R-426-427);
>
> (4) An article authored by *New York Times* reporter Nicholas Gage and published on August 25, 1972 which criticized petitioner's handling of the *Agro* case (R-422-425, 590);
>
> (5) Newfield's conversations with Joseph Hynes and Jerome McKenna* (A-508-509, 516, 586-587);
>
> (6) Petitioner's indictment (A-280-286);
>
> (7) Newfield's interviews with lawyers, judges and law enforcement officials in New York City who

* At the time Newfield interviewed them, Hynes was Chief Assistant District Attorney in Brooklyn in charge of the Rackets Squad and McKenna was Chief Counsel to the State Legislature's Joint Committee on Crime (R-328, 516).

gave the author their critical views of petitioner in confidence (R-516, 586, 590);

(8) Petitioner's admission in his testimony in the prior action that he gave Glover an illegal sentence (*cf.* R-419, 706-709).

Holt relied not only on its knowledge of the foregoing facts, but also on Newfield's substantial professional reputation for accuracy and honesty. Holt assuredly was entitled to fully rely on Newfield's reputation absent some substantial reason to doubt the accuracy of the articles or the bona fides of their author. (R-317-321, 328-332, 341-342, 353, 356-360.) *See* Point III, *infra.*

Petitioner then falsely asserts (Question "4.", Pb-3)* that Holt "purposefully omitted" from *CUJ* reference to the fact that assistant district attorneys "consented" to and "recommended" the "dispositions" in the *Burton, Glover, Vario* and *Agro* cases. The record below clearly shows that Marian Wood was never aware of these omissions prior to *CUJ*'s publication (R-356-494). More significantly, perhaps, the record shows that the assistant district attorneys in *Agro* and *Vario* neither "recommended" nor "consented" to "dispositions" (*i.e.*, the allegedly lenient *sentences* for which petitioner was criticized)—only the pleas (R-215-255, 256-279).** The Court of Appeals cor-

* This false assertion is repeated at Pb-11, 12 and 36.

** Petitioner omits to inform the Court that in his deposition at bar he admitted that the real reason he gave Agro a suspended sentence was that he felt he had to fulfill a "promise" for such disposition to Agro's attorney, even though at the time of the sentencing petitioner knew that the "consideration" for the promise was nonexistent (R-728-731). Petitioner's testimony in his depostion in the prior action that the district attorney requested a suspended sentence is supported only by petitioner's unsubstantiated statement (see Pb-18) and is belied by the fact that only the defense attorney appeared at Agro's sentencing (R-278, A-279). The Gage article certainly does not assert that the district attorney "recommended the sentence" (Pb-34, see R-422-425).

rectly suggested that Newfield was within the bounds of responsible journalistic comment in criticizing petitioner for his dispositions in *Glover* and *Burton* because regardless of the respective assistant district attorneys' "consents" to a suspended sentence and parole, petitioner had the final responsibility for securing substantial justice under the egregious circumstances present in those cases, and could even have done so in *Glover* in a legally correct manner (A-16, 30).

At Pb-5 petitioner inaccurately asserts that the Brooklyn Bar Association "found" that Newfield's charges were "false". The Association, by a "committee" of one attorney, merely concluded that the articles were false (A-205). Even cursory review of the text of the report shows that it fails to designate any material facts of and concerning petitioner published in the original articles which were in fact inaccurate.

The Morello Letter referenced at Pb-6 was never divulged to Marian Wood (R-44,45,47). The reason for its existence, moreover, is very much open to question (R-191). Indeed, all other asserted "evidence" of "omissions" and the like claimed by petitioner to have been known to Marian Wood prior to *CUJ*'s publication on March 16-18, 1974 simply never came to her attention.

For example, petitioner asserts (Pb-8) that Newfield gave Wood a copy of a May 16, 1973 *New York Times* article announcing the commencement of petitioner's prior action against *The Village Voice.** The inference petitioner draws from this "fact" is that Wood thus knew prior to *CUJ*'s

* In connection with this assertion, petitioner claims that Newfield "told" Wood to contact Victor Kovner, Esq., Newfield's counsel, about the prior suit. Newfield did no such thing. He gave Wood Kovner's number *in the event* she had any questions about the prior suit. She never did (R-338, 343, 493-494, 558-559).

publication that the prior suit was based on assertions of the falsity of the original *Voice* and *New York Magazine* articles and that this knowledge constituted a substantial reason for Holt to doubt their accuracy (*see, also* Pb-29). Wood, however, denied under oath ever having seen the said article, and Newfield corroborated her statement (R-492, 512; *see* R-331-332). Moreover, the article accurately describes the prior action as one based on the alleged falsity of an advertisement, *not* on the alleged falsity of the articles (R-491-492, 538).

Another example of the liberties petitioner has taken with the record is his assertion that Holt "knew from the court minutes in *Glover* that Glover was in jail for five years." (Pb-11). The only evidence in the record relating to what Ms. Wood knew about the *Glover* case absolutely negates the assertion: she knew nothing about Glover's 5-year sentence (R-356) and has never seen any of the pleadings, deposition transcripts or evidence produced in the prior action (R-44-45, 538-544, 557-558).

Petitioner's five-page "explanation" of his indictment (Pb-19-23)* is fraught with inaccurate and misleading inferences and record references. For example, while the grand jury did not specifically indict petitioner for "corruption" (see Pb-20) they did indeed indict him on one count of obstruction of justice and three counts of perjury (R-280-286); allegations of serious malfeasance in office which any layman could reasonably equate to "probable corruption". Petitioner also asserts that respondents published the charge that he was "probably guilty" (Pb-23). This assertion is an outright falsehood which again violates Rule 23(4) of this Court. Furthermore, the indictment "explanation" carries the insinuation that Marian Wood had prepublication knowledge of the fine distinctions petitioner draws. This insinuation is also negated by the record, which shows that Ms. Wood never had access to the indictment before or after the publication of *CUJ* (R-44-45, 49).

* The indictment was pending at the time of *CUJ*'s publication.

Petitioner's most unsupportable misuse of the record (Pb-42-45) is the argument that since an estoppel defense set forth in Holt's answer at bar contains "admissions" that respondent "knew of" the prior suit in April of 1973 and "relied on" petitioner's deposition testimony therein, Holt can be charged with knowledge that the prior suit attacked the articles as false, and that in his deposition in the prior action petitioner showed the articles to be false, thus presenting a jury question as to actual malice.

Respondents attacked this argument below as a constitutionally inappropriate "technical" hook on which to hang a finding that some evidence of Holt's alleged actual malice had been produced.* Still using this discredited thesis, however, petitioner tells the Court that he thinks it "hardly plausible that . . . Holt would not, as it admitted it did, obtain a copy (of petitioner's deposition)." (Pb-42)

The record provides an uncontradicted contrary answer to petitioner's wishful thought. Marian Wood testified that she never saw any of the pleadings or evidentiary materials in the prior suit (R-338-339, 342-343, 539, 542), and knew only what Newfield had told her about it—that the prior suit involved only an advertisement and that in his deposition in that case petitioner had admitted the truth of all the factual assertions contained in the original articles (R-342, 543). Thus the "admissions thesis", as the Court of Appeals apparently found, failed to present a scintilla of material evidence probative of Holt's alleged actual malice.

* The Court of Appeals' apparent rejection of petitioner's "admissions thesis" was correct. Admissions in the pleading of one defense cannot be used against the pleader in the adjudication of a separate claim or defense. 31A C.J.S. *Evidence*, § 302, pp. 776, 777; 4 *Wigmore, Evidence*, § 1064(2)(2), pp. 70, 71.

III.

The writ should be denied because the Court of Appeals' dispositive "actual malice" ruling as to Holt was clearly correct under both State and Federal Constitutional Law and under a further constitutional ground not adopted below.

A. State Law:

Rule 3212 of the Civil Practice Law and Rules of the State of New York, and New York State decisional law interpreting the statutory summary judgment procedure, require entry of judgment for the movant where the opposing party is found to have presented no evidentiary facts capable of raising a jury question on a dispositive issue. *Shapiro* v. *Health Insurance Plan,* 7 N.Y.2d 56, 60-61, 64 (1959); *Trails West, Inc.* v. *Wolff,* 32 N.Y.2d 207 (1973); *James* v. *Gannett Co. Inc.,* 40 N.Y.2d 415 (1976).

Under these guidelines, petitioner's affidavit opposing respondents' summary judgment motion (R-436-459) was found to be insufficient as a matter of law. The opposing affidavit contains the same type of rambling, discursive hash of factually unsupported assertions, denials, conjectures and suspicion that fill this Petition. Thus the Court of Appeals was unquestionably correct in finding that petitioner had presented no evidence of falsity, or of Holt's alleged actual malice, thus requiring reversal of the clearly erroneous decisions below and the entry of summary judgment for Holt.

B. Constitutional Law:

The judgment presented for review also is in complete accord with the guidelines set down by this Court in its decisions delineating the extent to which the First Amendment protects the media in publishing factually false reports

regarding public officials. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Assuming *arguendo* that petitioner established the falsity of published material facts of and concerning him, he still cannot prevail on this record as a matter of law because it is nonetheless clear that he presented *no* evidence that Marian Wood acquired prepublication knowledge of specific instances of literal or factual falsehood. Thus the Court of Appeals was correct in finding that there was no evidentiary basis in this record for a jury inference that Holt published with a high degree of awareness of probable falsehood. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Gilberg* v. *Goffi,* 21 A.D.2d 517, 526 (App. Div. 2d Dept. 1964), *aff'd* 15 N.Y. 2d 1023 (1965), (A-29, 30, 46).

Holt did, of course, concede that Marian Wood had prepublication knowledge of the conclusions reached in the Brooklyn Bar Association report. Since, however, an appellate court's constitutionally-required review of the record seeks evidence capable of illuminating the defendant's subjective state of mind on the issue of actual malice (*St. Amant* v. *Thompson, supra,* 390 U.S. at 731-732), mere proof that Holt knew of the report's conclusions is not sufficient standing alone.

The Court of Appeals properly analyzed all the evidence on this issue and correctly concluded that Ms. Wood's stated reaction to her acquisition of knowledge of the report's conclusions—her disbelief in the veracity of the report based on Newfield's statement to her that the report was biased, unfair and politically inspired, coupled with the confirmatory effect of her learning of plaintiff's indictment (R-345, 355-358, 496-499)—demonstrated as a matter of law that the report did not constitute a substantial reason to doubt the accuracy of Newfield's articles or his bona fides as a reporter (A-29). Thus the dispositive ruling of the Court

of Appeals as to Holt also turned on that Court's constitutionally correct analysis of the pertinent evidence. Again, this fact should be deemed to effectively immunize the judgment below from further review here. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

Under the most rigorous constitutional analysis the judgment below clearly conforms to the rulings of this Court. No decision of this Court has ever intimated that in a libel case where First Amendment considerations are concededly paramount due to the plaintiff's "public official" status, a trial must ensue to permit a jury to determine whether to wholly reject the sworn, uncontradicted, exculpatory testimony of the defendant on the issue of actual malice where the prospective trial record contains no evidence capable of establishing the constitutionally-required "guilty" state of mind. Indeed, this Court has consistently ruled to the contrary. *See New York Times Co.* v. *Sullivan,* 370 U.S. 254, 285-286 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

The correctness of the Court of Appeals' judgment as to Holt is further supported by the facts that the Brooklyn Bar report contained no demonstration that the original articles contained any factual inaccuracies of and concerning petitioner (R-181-189), and that Marian Wood had no prepublication knowledge of the three immaterial inaccuracies the original articles in fact contained (A-17; R-557-558, 538, 544). The Court below was also correct in ruling that Marian Wood was constitutionally entitled to credit Newfield's rejection of the Brooklyn Bar report's conclusions rather than the conclusions themselves [A-30; *cf., Time, Inc.* v. *Pape,* 401 U.S. 279, 290-292 (1971).]

C. The Opinion Privilege:

The correctness of the judgment below rests also on a clearly applicable and constitutionally permissible premise for reversal and entry of summary judgment for Holt which was not adopted by the Court of Appeals.

The Court below declined to adopt Holt's argument that the statements "probably corrupt" and "suspiciously lenient" were "pure" opinion and thus absolutely privileged under the First Amendment [*Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339-340 (1974); *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* — U.S. —, 97 S.Ct. 785, 786 (1977); Restatement, Second, Torts, § 566] because the Court of Appeals held that these statements implied criminal conduct.

The Restatement rule and the *Buckley* decision, *supra,* do not delimit the scope of absolutely privileged opinion to only those statements which do not assert corrupt conduct. Indeed, the only stated condition precedent to qualifying for the absolute privilege is that the defendant also published true facts supporting the opinion, as respondents did in *CUJ.* A media commentator's view that a public official or candidate for public office is "probably corrupt" where the commentator holds information that at the time of the publication a special state prosecutor and twenty-three grand jurors thought the official had perjured himself and obstructed justice is an excellent example of the value sought to be secured by the privilege: the right to give one's views freely, robustly and even pejoratively on the fitness for office of a high-level public official. *Cf., Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 968; *Time, Inc.* v. *Pape, supra,* 401 U.S. at 291.

Additionally, it seems clear that under both *Buckley* and the Restatement the Court of Appeals would have been

correct in ruling that the statement "(petitioner) is corrupt" is an opinion because "corrupt" is subject to many different shades of meaning and cannot be proved true or false with absolute certitude. *A fortiori,* "probably corrupt"—a phrase of much looser, more figurative meaning than "corrupt"—can be held to be an absolutely privileged opinion with complete constitutional correctness.

In the premises, it seems clear that the Court would have approved a ruling by the Court of Appeals that the subject statements come within the scope of the absolute privilege announced in *Gertz, supra,* 418 U.S. at 339-340.

IV.

The writ should be denied as to Question "4." because it does not present a substantial federal question, and as to Questions "5." and "6." because they present no federal questions.

Question "4.":

Petitioner asserts that the Court of Appeals incorrectly interpreted and applied *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) in ruling that respondents' "knowing" omission from *CUJ* of the "consent and recommendation of the district attorney" did not constitute evidence of actual malice. Several problems raised by this assertion are overlooked by petitioner.

Firstly, the only evidence in the record relevant to Holt's "knowledge" of the "omissions" is, again, Marian Wood's sworn testimony that she had *no* prepublication knowledge of them (R-356, 494).

Secondly, the Court of Appeals neither "interpreted" nor "applied" *Tornillo.* The Court below merely quoted

from the decision to support the correctness of a ruling which was actually based on the holding in *James* v. *Gannett Co. Inc.,* 40 N.Y. 2d 415, 424 (1977) that relatively minor omissions from an otherwise factually accurate report do not create liability under the common law of libel of the State of New York (A-31).

Thirdly, the Court of Appeals rejected petitioner's contention that the respondent's omission to publish the district attorney's "consents" (shown *supra* to have been somewhat less significant than petitioner, preoccupied with vindication, views them to be) constitute the gravamen of the action (A-32). Thus the ruling that the opinions published *do* constitute the gravamen of the action, coupled with petitioner's omission to challenge the Court of Appeals' rulings with respect thereto, render question "4" not sufficiently substantial to warrant review.

Questions "5." and "6.":

The Court can search the record from cover to cover and find nothing to support the insinuation carried by these questions that the proferred issues were either considered or decided below. Moreover, question "6" is addressed solely to respondent Newfield.

Additionally, both questions are grounded on the erroneous premise that in a public official's libel suit, the defendant bears the burden of establishing the substantial truth of the sued-upon charge as required under the common law defense of justification. As this Court has made abundantly clear, the opposite is true: the public official plaintiff bears the burden of proving that the defendant published false, material and defamatory statements of fact of and concerning him. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285-286 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARLETON G. ELDRIDGE, JR.
200 Park Avenue
New York, N. Y. 10017

On the Brief:
JOHN M. KEENE, III
JERRY SLATER

November 7, 1977

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

v.

HOLT, RINEHART & WINSTON, INC.
and JACK NEWFIELD,

Respondents.

Certificate of Service

I, CARLETON G. ELDRIDGE, JR., a member of the Bar of this Court, hereby certify that on the 7th day of November, 1977, three copies of the Brief for Respondent Holt, Rinehart & Winston, Inc. in Opposition to Petition for a Writ of Certiorari were mailed with First Class Postage prepaid, to Counsel for Petitioner, Irwin N. Wilpon, Esq., 135 Willow Street, Brooklyn, New York 11201 and three copies were mailed to Counsel for Respondent Jack Newfield, Victor A. Kovner, Esq., 30 Rockefeller Plaza, New York, New York 10020.

CARLETON G. ELDRIDGE, JR.
200 Park Avenue
New York, New York 10017
Counsel for Respondent
Holt, Rinehart & Winston, Inc.

IN THE

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DOMINIC S. RINALDI,

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—against—

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BRIEF FOR RESPONDENT JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICTOR A. KOVNER
30 Rockefeller Plaza
New York, New York 10020
Counsel for Respondent Newfield

On the Brief:
HARRIETTE K. DORSEN

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INDEX

CITATIONS

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BRIEF FOR RESPONDENT JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Jack Newfield ("Newfield") prays that the Petition for a writ of certiorari to the Court of Appeals of the State of New York to review the judgment entered on July 14, 1977 be denied.

Jurisdiction

The judgment below is not reviewable by writ of certiorari, since it is based on an independent and adequate state ground. Where a ruling is based on state procedure and state substantive law, it is well established that the state grounds are adequate to support the judgment and this Court lacks jurisdiction to review such a judgment. Stern and Gressman, *Supreme Court Practice*, § 3.33 (4th ed. 1969).

The Petition does not question the applicability of the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254

(1964), that a public official libel plaintiff is required to prove actual malice by clear and convincing evidence. All six questions presented by petitioner attempt to reargue the issue of the sufficiency of the evidence of actual malice.* (P 5-6)

The dispositive portion of the decision of the New York Court of Appeals involved the application of § 3212 of the New York Civil Practice Law and Rules. (A 32) The Court of Appeals found that there was no triable issue of fact applying New York summary judgment procedures under New York decisional law. In awarding summary judgment, the court below cited four New York cases**, and an Idaho case, *Bandelin* v. *Pietsch,* —— Idaho ——, 563 P. 2d 395 (1977). (A 32) *Bandelin* involved a similar motion for summary judgment under Idaho law; in that case this Court has recently denied a petition for certiorari. —— U.S. ——, 46 U.S.L.W. 3242 (October 11, 1977). The analysis below of the sufficiency of the evidence on a motion for summary judgment was certainly a matter of state law.

Zacchini v. *Scripps Howard Broadcasting Co.,* —— U.S. ——, 53 L. Ed. 2d 965 (1977), cited by petitioner (P 2) is inapposite. That case involved a claim that a television broadcast of newsworthy material was protected by the First Amendment despite the plaintiff's "right of publicity." The Court specifically found that the Ohio decision was based on federal grounds alone.

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* Page reference to the Petition will be cited as (P 1 et seq.), to petitioner's Appendix as (A 1 et seq.) and to respondents' Joint Appendix on Appeal in the New York Court of Appeals as (R 1 et seq.).

** *James* v. *Gannett Co.,* 40 N.Y. 2d 415 (1976); *Chapadeau* v. *Utica Observer Dispatch,* 38 N.Y. 2d 196 (1975); *Trails West, Inc.* v. *Wolff,* 32 N.Y. 2d 207 (1973); *Gilberg* v. *Goffi,* 21 A.D. 2d 517, aff'd 15 N.Y. 2d 1023 (1965).

Questions Presented

1. Where a perjury and obstruction of justice indictment, which asserts that the grand jury has been investigating corrupt disposition of criminal cases, is pending against a judge, whose sentencing and dispositions in cases involving organized crime defendants have been widely criticized by the press and legislative investigators and where a reporter has obtained additional evidence of improper dispositions by the judge, does publication of the terms "probably corrupt" or "suspiciously lenient" when applied to the judge constitute protected expression of opinion or actionable statement of fact?

2. Where the court below awarded summary judgment pursuant to state common law and a state statute, does a Petition seeking to reargue the court's analysis of the sufficiency of the evidence of actual malice raise a substantial constitutional question warranting Supreme Court review?

Statement

From the latter part of 1972 until early 1974, Respondent Jack Newfield ("Newfield") was working with his editor, Marian Wood of Holt, Rinehart & Winston ("Holt") in connection with the manuscript of *Cruel and Unusual Justice* (the "Book"). Rather than respond to the mass of detail contained in the Petition, a chronological summary of the material events is set forth below:

Date	*Event*
June 15, 1972	The New York Joint Legislative Committee on Crime at a public

Date	*Event*
	hearing named four State Supreme Court Justices, including petitioner, who imposed questionably lenient sentences in felony narcotics cases. (R 368)
June 16, 1972	A report of the hearing appeared in the *New York Daily News* naming petitioner as one of the four State Supreme Court Justices who handed down "wrist slap sentences in felony narcotics cases." (R 368)
June 17, 1972	A *New York Daily News* editorial called for the convening of a Court on the Judiciary (the court with removal power) to review allegations against petitioner and three other judges for "astonishingly minor sentences in various major felony cases." (R 369)
August 8, 1972	Norman Burton, a non-addict heroin dealer was arraigned before petitioner on a charge of an attempt to bribe Police Officer William David, who had previously arrested Burton on two felony narcotics charges. At the arraignment, after learning that the assistant prosecutor in court did not have the file,*

* The Rackets Bureau Chief had given instructions to seek $10,000 bail to a different assistant (R 508), who went to the wrong courtroom. (R 509) The Bureau Chief subsequently described petitioner's conduct at the arraignment as "outrageous". (R 508-509)

Date	*Event*
	petitioner announced he was going to fix bail for plaintiff. Upon learning that the arresting officer was in court, petitioner called the officer to the bench, abused him in open court, and then paroled the defendant. (R 200-202)
August 8-27, 1972	Respondent Newfield learned from Police Officer David and his Supervising Sergeant, Thomas Santise, of the circumstances surrounding the arraignment of Burton, reviewed the information made public at the hearing of the New York State Joint Legislative Committee on Crime (R 516) and wrote the first article about petitioner (A 120), which was published in the August 31, 1972 issue of the *Village Voice.*
September-October 1972	Respondent Newfield conducted further investigation regarding questionable dispositions involving defendants associated with organized crime, including the review of files maintained at the office of the New York Joint Legislative Committee on Crime. (R 516; 587-89)
September 25, 1972	An article entitled "Study Shows Courts Lenient with Mafiosi" appeared on the front page of the *New York Times.* (A 136-139, R 370-72) The article contrasted the lenient

Date	*Event*
	sentences imposed in *People* v. *Vario* and *People* v. *Agro* upon two defendants with well-known associations with organized crime and long criminal records with the five year sentence imposed by petitioner upon a 19-year old Puerto Rican first offender.
October 16, 1972	The *New York Magazine* issue of this date contained the article entitled "The Ten Worst Judges In New York". (A 134-135; R 473-474)
October 12, 1972 October 17, 1972 November 28, 1972	Letters from Messrs. Morello, Wexler and Connolly were written to the Editor of *New York Magazine.* (A 183-187) The Brooklyn Bar Association Report (the "Brooklyn Bar Report") referred to in the Connolly letter was not made available with the letter.
April 1973	Petitioner instituted an action for libel against The Village Voice, Inc., based on an advertisement published in the *New York Times* on February 25, 1973. The advertising firm of Scali, McCabe, Sloves was subsequently added as a party defedendant (hereafter referred to as the "Scali case"). (A 114-139)
June-October 1973	Three days of discovery proceedings in the Scali case were held, and both petitioner and Newfield were

Date	*Event*
	examined under oath. During Newfield's examinations copies of the transcripts in *People* v. *Burton*, *People* v. *Vario* and *People* v. *Glover* as well as the letters from Morello, Wexler and Connolly were marked as exhibits.
November 13, 1973	The Special State Prosecutor released a grand jury indictment charging the petitioner with the commission of four felonies, namely three counts of perjury and one count of obstruction of justice.* (A 290-298)
	The indictment received extensive publicity in the New York media, a

* The indictment stated in part:

". . . The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a *corrupt manner*. More specifically, the Grand Jury is investigating to determine whether the defendant has been *corruptly influenced* in relation to the disposition of a criminal case in Nassau County entitled *People* v. *Gomes*, et al. . . ."

"The testimony was to a material matter, in that the defendant's efforts on behalf of Gomes and his accomplices would tend to support the allegation, being investigated by this Grand Jury, that the defendant was part of a *corrupt scheme* to obtain a lesser plea and a lenient sentence in that case."

". . . The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a *corrupt manner*. More specifically, the Grand Jury has been investigating to determine whether the defendant had *corruptly influenced* the disposition of a criminal case in Kings County entitled *People* v. *McCauley* . . . [emphasis supplied]". (R 280-286)

Date	*Event*
	sample of which appears at R 287-288.
November 1973	Newfield obtained a copy of the Brooklyn Bar Association Report (the "Brooklyn Bar Report") prepared in 1972. (R 514)
December 1973	Newfield completed his work on the Book.
January-February 1974	The Book was printed and bound.
March 16-18, 1974	Copies of the Book were placed on sale in bookstores. (R 348)
April 9, 1974	The City Bar Association released the report of its Committee on State Courts of Superior Jurisdiction (the "City Bar Report"). The report evaluated the charges against the eight State Supreme Court Justices mentioned in the article "The Ten Worst Judges in New York", sustained in part the charges as to six of the judges named, but did not sustain the charges as to petitioner. (R 151-178)
April 19, 1974	The Appellate Division sustained the third and fourth counts of the indictment. *People* v. *Rinaldi,* 44 A.D. 2d 745 (1974).
June 14, 1974	The New York Court of Appeals rejected the appeal by petitioner to dismiss the entire indictment. *People* v. *Rinaldi,* 34 N.Y. 2d 846 (1974).
July 1974	Petitioner was tried before a jury and acquitted.
August 1974	Petitioner instituted the present action against the publisher of the Book, the author of the Book and The Village Voice, Inc.*

Reasons for Denying the Writ

As discussed above in the section on jurisdiction, the decision of the Court of Appeals rested on an independent and adequate state ground. Accordingly, there is no jurisdiction for Supreme Court review. In addition, there are three further grounds to deny the Petition pursuant to established principles of Supreme Court practice.

POINT I

There Is No Important Question of Constitutional Law Presented Requiring Supreme Court Review.

Rule 19 of the Supreme Court sets forth the appropriate grounds upon which petitions for certiorari to review state court decisions are considered. None of those grounds are presented in this case. There is no conflict between the decision below and that of any other court which requires resolution by Supreme Court action; no new or novel ques-

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* The court of first impression dismissed the claim against The Village Voice, Inc., which dismissal was unanimously affirmed by the Appellate Division. Petitioner did not appeal from that dismissal.

tion of constitutional law was decided below; as demonstrated in Point II of this brief the decision of the Court of Appeals was clearly correct and applied settled principles of law as announced by this Court; this case does not involve constitutional questions of broad significance but rather turns on whether or not petitioner's evidence is sufficient to meet his burden of proof and merely requires for its resolution the analysis of the particular facts offered.

The Court of Appeals applied the rule of *New York Times Co.* v. *Sullivan, supra,* requiring petitioner, as a public official libel plaintiff, to bear the burden of proving with convincing clarity the falsity of the statements about him and the actual malice on the part of respondents. Petitioner does not challenge this rule of law, nor its applicability to the petitioner, but merely argues that the Court of Appeals did not correctly apply this settled rule to the facts. However, Supreme Court Rule 19(1) requires that special and important reasons be present for the granting of certiorari where the legal principles involved are clearly correct and are not challenged by the petitioner.

Where the issue turns only on the analysis of a given fact pattern, the case is not one which requires the attention of the Supreme Court. Supreme Court review is appropriate for cases which have some national significance or present an opportunity for the clarification of important principles; even where a state court has erred, certiorari will not be granted without the presence of an issue of wide significance. Stern & Gressman, *Supreme Court Practice,* § 4.18 (4th ed. 1969).

In *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924) a writ was dismissed as improvidently granted when it appeared from the briefs and argument that, rather than involving a question of federal law

important to the public at large, the case turned on the factual question of whether the evidence sufficed to establish the dedication of the petitioner's property to public use.

The Petition amounts to little more than an attempt to reargue the sufficiency of the evidence offered to prove actual malice and falsity. The Petition contains no more than 2 or 3 pages of legal argument; the remainder of the 45 pages consists of specific reference to the proof offered by the petitioner in the proceeding below. There is no showing in the Petition of the significance of this issue to other litigants or to the development of the constitutional law of libel. The Court of Appeals did not hold, as alleged by petitioner, that the "knowing omission by a publisher of crucial facts showing the falsity of the publication was a permissible exercise of editorial judgment." (P 13) What the Court of Appeals *did* hold was that, in the context of an article on court reform and in view of the extensive investigation undertaken by Newfield, the omission of relatively minor facts in a basically accurate account was not actionable. As noted at page 12 *infra,* the holding was a matter of New York common law. This decision would scarcely deprive the naked wife, who was examined by her doctor, from the slander claim described in the Petition. (P 37) The Court of Appeals did not establish any different or greater burden of proof, as asserted by petitioner (P 13), but merely held that this petitioner on this particular set of facts did not satisfy his burden under New York summary judgment procedure.

As Chief Justice Taft remarked in *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923), "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties."

POINT II

The Decision Below Is Clearly Correct.

The New York Court of Appeals granted summary judgment in favor of respondents on two independent grounds.*

The court below correctly held that the omissions from the publication of the prosecutor's consent or acquiesence to the dispositions in the four criminal cases whose transcripts were before the court (*Burton, Glover, Vario* and *Agro*) were "not so material as to alter significantly the conclusion to be drawn from the episodes reported." (A 30)

This holding was based on a state common law analysis, in which a judge's ultimate responsibility for sentences was weighed, together with the subjective context in which the material was published. *James* v. *Gannett Co.*, 40 N.Y. 2d 415 (1976). In the context of an ardent plea for prison and court reform, the court correctly found that the omission of "relatively minor details in an otherwise basically accurate account is not actionable." (A 31)

With respect to the terms "probably corrupt" and "suspicious leniency," the court correctly held that petitioner had failed to establish either that these terms were factually false or that they were published with actual malice.

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* Except for the terms "probably corrupt" and "suspiciously lenient," the court below also correctly held that the language in suit constituted the expression of opinion which, when published with the reasons for the author's views, was absolutely protected by the First Amendment. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). (A 23-27) The Petition does not question the constitutional protection afforded to opinion, nor even the court's holding that the First Amendment protected the severely critical observations about petitioner's conduct in office, i.e., that he was incompetent and should be removed from office.

A. "Suspiciously Lenient in Felony Narcotics Cases"

While the court below read this phrase as implying a statement of fact, Newfield contends that, since the reasons for his conclusions were included, the phrase constituted protected expression of opinion. *Hotchner* v. *Castillo-Puche,* 551 F. 2d 910 (2d Cir. 1976), *cert. den.,* —— U.S. ——, 46 U.S.L.W. 3202 (1977).

The uncontroverted facts in the Book fully support the opinion. In *People* v. *Glover,* a known non-addict heroin dealer, charged with narcotics felonies, even while on bail on earlier charges and following his plea of guilty to an unrelated federal charge, received an illegal conditional discharge following a plea of guilty to a Class C felony. (R 206-214) Under oath, petitioner admitted he knew the sentence was illegal at the time it was imposed. (R 707) This remarkable leniency had been cited at the hearing of the Joint Legislative Committee on Crime, characterized as a "wrist-slap sentence" in the *New York Daily News* (R 368) which then called for the convening of a Court on the Judiciary to review this "astonishing" disposition. (R 369)

Petitioner's dispositions in *People* v. *Vario* and *People* v. *Agro* had been harshly criticized on the front page of *The New York Times* in the article entitled "Study Shows Courts Lenient with Mafiosi—Racketeers Found Less Likely To Be Convicted In The State Than Others." (R 370-372)

Furthermore, petitioner has conceded that he never complained to the *News* or the *Times* about these articles, never requested a retraction, nor knew of anyone who wrote to the *News* or the *Times* challenging the accuracy or the conclusions.

While the court below correctly held that petitioner had not established that these dispositions were not "suspiciously lenient," there can be no question that any of the documents offered by petitioner led Newfield to entertain doubts about his conclusion which had been previously expressed in the two largest newspapers in the New York metropolitan area. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). The Connolly letter criticized a Newfield article which was not published in the Book, and thus could not be evidence of actual malice. The transcripts, as well as the letters to New York Magazine merely confirmed the accuracy of the original articles*, with the sole addition of the fact that the prosecutor had acquiesced in some of the dispositions.

The Brooklyn Bar Report was criticized in the Book by Newfield as unpersuasive, since it was prepared by a single lawyer associated with the Brooklyn Democratic organization who interviewed neither Newfield nor any of the law enforcement officers involved in *People* v. *Burton.* (A 515) Moreover, the Brooklyn Bar Report was obviously in error regarding the sentence in *People* v. *Glover.* The Report stated that Judge Rinaldi's conditional release of Glover was within his "discretion" (R 185), whereas it was in fact knowingly illegal, as petitioner himself later conceded. (R 707) Lastly, the City Bar Report was not released until several weeks after the Book was published. (R 418, 514)

In short, there is simply no evidence that any of the documents available to Newfield altered his conclusion reached

* As acknowledged both by the Court of Appeals and all of the lower court judges who considered the case, outside of three minor inaccuracies conceded by Respondents (A 17) upon which petitioner places no reliance, the articles republished in the Book contained no factual error.

in the course of his extensive research.* None of his sources were of doubtful veracity, since he relied upon interviews with law enforcement officials (including officers David and Santise, and Rackets Bureau Chief Hynes), with Jerome McKenna, Chief Counsel to the Joint Legislative Committee on Crime, his review of the Committee's file on dispositions in organized crime cases, his review of the published criticisms in the other newspapers, as well as confidential interviews with prosecutors, judges, lawyers and prisoners. (R 516) Of course, before the Book was completed, his adverse conclusions were further corroborated by petitioner's indictment.

B. "Probably Corrupt"

The term "probably corrupt" appeared only once in the Book, in a postscript to the August 31, 1972 article. In the postscript, just prior to the use of this expression, Newfield had written:

> "On November 12, 1973, Judge Rinaldi was indicted on three counts of perjury by a grand jury impanelled by Special State Prosecutor Maurice Nadjari. He was also indicted on one count of obstruction of justice. The perjury involved criminal cases Judge Rinaldi was suspected of fixing. If convicted on all counts Judge Rinaldi could be sentenced to 22 years in prison."

It is undisputed that the postscript was written and published while the plaintiff was under indictment. Since a grand jury of 23 persons had found that there was probable

* As noted by the court below, the author's affidavit stated that:

> "At the time I completed work on [the book], I had no reason to doubt the accuracy of the material contained therein and to this very day continue to believe in the accuracy of all the factual material contained in the book as well as the reasonableness of the many opinions I drew therefrom." (A 20)

cause to believe that plaintiff had committed four felonies (unrelated to the four cases previously reported by Newfield and others), it was perfectly proper for a reporter to adopt the opinion at that time and in that context that the petitioner was "probably corrupt," (a term which was not used in any other setting in the entire book), *Hotchner* v. *Castillo-Puche, supra,* especially since Newfield was aware from his extensive investigation of the severe criticism by the *Times,* the *News,* the New York Legislative Committee, law enforcement officials and even other judges.

While Newfield contends that, given the pendency of the indictment and the other information he had, the phrase constitutes an expression of opinion, there is simply no evidence that Newfield had any doubts as to the truth of the phrase at the time the Book was published. *St. Amant* v. *Thompson, supra.* Even if the statement was treated as one of fact and not opinion, none of the documents on which petitioner relies as evidence of knowing or reckless falsity (i.e., the transcripts of the four disputed cases, the letters written to *New York Magazine* in 1972, nor the Brooklyn Bar Report) contradicted the facts he had learned concerning the questionable dispositions in the four criminal cases reported in the Book (as the Court below found), nor the four counts of the indictment; nor do the documents have the slightest relevance to the allegations contained in the indictment. In short, Newfield's extensive prior research tended to corroborate, not to refute, Newfield's view that petitioner was "probably corrupt."

POINT III

The Petition Does Not Comply With Supreme Court Rule 23(4).

Rule 23(4) of the Supreme Court provides that:

> "the failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

This Petition is forty-five pages long and consists almost entirely of a mass of detailed facts and references to specific documents which accompany the Petition in an Appendix almost 300 pages long. This great mass of material does not present in a brief and clear manner any reasons for the granting of certiorari in this case and in fact graphically illustrates that the issues involved are narrow and factual.

Ordinarily a petition for certiorari should be no more than twenty pages. Only the most complicated cases should require more than that. Stern and Gressman, *Supreme Court Practice,* § 6.41 (4th ed. 1969). The Court has denied petitions on these grounds on numerous occasions. See, e.g., *Brown* v. *Krietmeyer,* 275 U.S. 496 (1927), *Jarnavgsstyrelsen* v. *National City Bank,* 275 U.S. 497 (1927); Annot. *Requirements of a Certiorari Petition,* § 5, 32 L. Ed. 2d 830 (1972) and cases cited therein.

As for the requirement of accuracy, respondent notes that the Appendix contains a glaring error in connection with a material fact. Marian Wood testified that the Book was placed on sale in bookstores in the period March 16-18, 1974. (R 348) This is a significant date, since as evidence

of actual malice petitioner relied heavily upon the City Bar Association Report, which concluded that Respondent Newfield had not substantiated his charges against petitioner. The report was released to the public on April 9, 1974 so that if the Book was on sale in March neither Newfield nor Wood could have seen the report at the time the Book was placed on sale. In petitioner's Appendix, Ms. Wood's testimony is reproduced (A 271-276); however the reproduction contains a shocking alteration in the transcript, so that it now reads that the book was released on *May* 16-18, (A 274) *after* the City Bar Report.

The alteration of the record is obvious—the letters "rch" have been erased and the letter "y" inserted somewhat off level. This alteration leaves the misleading impression that the Book was not published until after the City Bar Report became public. Moreover, the Petition emphasizes the technical publication date of April 15, 1974 (e.g., P 7, 29) furthering the misleading impression.

The material alteration, as well as the lack of brevity, violates Rule 23(4) and warrants denial of the writ.

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully submitted,

VICTOR A. KOVNER
Counsel for Respondent
Jack Newfield

On the Brief:

HARRIETTE K. DORSEN

November 7, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-553

DOMINIC S. RINALDI

Petitioner,

v.

HOLT, RINEHART & WINSTON, INC. and JACK NEWFIELD

Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

IRWIN N. WILPON
135 Willow Street
Brooklyn, New York
11201

COUNSEL FOR PETITIONER

I N D E X

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I

RESPONDENT'S CONTENTION AS TO THE INACCURACY IN THE APPENDIX IS IN ITSELF DECEITFUL

The respondents deceitfully omit from their briefs that the petition herein stated at pages 43-44 that Holt's editor Wood had admitted in her moving affidavit that she had

read the April 9, 1974 article in the New York Times about the Association of the Bar Report which "she coupled with the statement that copies of the book whose publication date was April 15, 1974, had been released for sale some weeks before (Appendix FF,A274)". This clearly shows that the typing of "May" instead of "March" at A274 was plainly an error in transcription and that the petition had actually stated it to be some weeks before April 9, 1974, which would be in March,in citing A274, unfortunately not noticing the error in transcription of the Appendix. A reading of A274 itself indicates from the context of Wood's claim that this must be an error and that she was claiming a distribution of the book prior to April 9, 1974 and not after.

Respondent Holt's statement(brief, p.6) that Wood did not see the New York Times article of April 9, 1974 until after this action was commenced and has never seen a copy of the report, deceitfully omitted Wood's contrary admission above stated that she did see it (Appendix FF,A273) and that when Newfield obtained a copy of the Report on April 9, 1974, (Appendix DD, A250) Wood admitted that

he then told her of its conclusion that he had not substantiated his charges against petitioner (Appendix FF,A274).

There are other similar deceptions in Holt's brief. At page 11 it states that the Brooklyn Bar Association conclusion that Newfield's articles were false was that of one attorney, omitting the letters to Voice and New York Magazine of the Brooklyn Bar Association, signed by its President, that this was the conclusion of the Bar Association (Appendices S, T, A182,183). Also, at pages 11-12, Holt's brief states that Newfield corroborated Wood's statement that she had never seen the New York Times article of May 16, 1973, omitting to mention Newfield's sworn testimony on disclosure that "in May I showed her the article in the New York Times"."The only thing I gave Holt was the New York Times clipping about the filing of the suit" (Appendix DD, A245,246).

II

THE CONTENTION OF THE RESPONDENTS THAT THE CHARGES OF "SUSPICIOUS LENIENCY" AND "PROBABLY CORRUPT" ARE MERE PRIVILEGED OPINION IS UNTENABLE AS THE COURT BELOW CORRECTLY HELD

Newfield stated in the book that he

wrote three articles "detailing suspiciously lenient decisions by Justice Rinaldi. Two of these involved Mafia members Paul Vario and Sal Agro and a third involved a narcotics delaer named Clifton Glover" (Appendix F, A98). "I wrote four articles detailing cases in which Judge Rinaldi had acted suspiciously in ways that defied law and reason" (Appendix F, A100), and he testified on pre-trial disclosure that this charge was based on the Burton,Glover, Vario and Agro cases primarily and that when he wrote it he had no other cases in mind (Appendix CC, A242-243).

These are charges of "suspicious leniency"connoting venality and corruption in specific cases, the truth or falsity of which depends on the facts in those cases. At the time of the republication of the articles the respondents knew from the minutes in the four cases that the dispositions were on the consent and recommendation of the district attorney. Despite this, they republished the articles charging "suspicious leniency" in those cases.

The consents and recommendations of the district attorneys is what removes "suspicious" from "suspiciously lenient".

To retain it would require a finding that the inducing consents and recommendations of the district attorneys were "suspicous" and thus venal and corrupt. The respondents never made any such charge. For a judge to follow a recommendation of a district attorney may, in criticism, be said to be bad judgment, but it cannot be said to be "suspicious".

For the respondents to have republished the articles as originally written, despite their knowledge of the district attorneys'participation in the dispositions, is clearly evidence of malice as stated in Question "4" of the petition, as argued at pages 36-38 of the petition.

Even if these charges could conceivably be deemed an opinion, it is an opinion purported to be supported by the author's private knowledge, unknown to the reader, of the detailed facts in those four cases. In such a case, "the expression of an opinion becomes as damaging as an assertion of fact" Hotchner v. Doubleday & Company, Inc. (2 Cir) 551 F2d 910,913 (1977) cert den - U.S. October 4, 1977); AfroAmerican Publishing Co. v. Jaffe (D.C. Cir)366 F2d 649,655, (1965).

The listing of other claimed sources of support for these charges in Holt's brief (p.9) and Newfield's brief (pages 4-6) are with the exception of the indictment in Holt's recital, and the recital in Newfield's brief after April, 1973, the date of institution of the prior suit, alleged second-hand information upon which the publication of the original articles purported to be based which became irrelevant when prior to republication, the respondents, in the course of the prior action against Voice became aware in June to October, 1973, from the court records, of the actual facts in those four cases (Petition pages 25-29). Newfield's brief (pages 6-7) admits such acquired knowledge in the course of the prior case and Holt's answer in this case similarly so admits (Appendix G, A110-111).

As to the indictment, the petition herein, (pages 19-25) has demonstrated its complete lack of probative force to support the charge of "probably corrupt". The petition herein at page 23 did not say that the respondents used the words "probably guilty" as Holt claims at page 12 of its brief. The petitioner there

equated the charge of "probably corrupt" based solely on an indictment with a charge of "probably guilty" on the indictment, which is plainly so. If there is a distinction, it is a distinction without a difference.

III

THERE IS NO STATE LAW QUESTION IN THIS CASE

The respondent's defense to this action is that their publication was "privileged under the First and Fourteenth Amendments to the Constitution of the United States." (Appendix G,A109).

The Court below based its decision on what it deemed the compelling constraint of the decision of this Court in New York Times v. Sullivan, 376 U.S. 254 (Appendix C, A 6,21-22, 35-36, 38).

A summary judgment motion is a procedural motion to dismiss, which was granted by the Court of Appeals in its concluding paragraphs on the basis of its holding that petitioner had not made the showing of falsity and malice required by New York Times v. Sullivan, (Appendix C,A35-36).

IV

QUESTIONS "5" AND "6" OF THE PETITION AND PROPERLY BEFORE THIS COURT

Respondent Holt at pages 3 and 19 of its brief deceitfully states that these questions (petition pages 34-35, 39-41) were not considered or decided by the Court of Appeals, omitting to state that they were in fact raised by the petitioner in the Court of Appeals at pages 41 and 51 of his brief in that Court. These excerpts from the brief are annexed to this reply brief as Appendices 1 and 2.

Although the Court of Appeals did not discuss these questions raised by petitioner as the respondent in that Court as part of his showing of malice, it neccessarily, by its reversal, decided them against the petitioner. What is required in order to bring these questions to this Court is that they were raised below, which is the fact. (Street v. New York 394 U.S. 576,583, 22 1 ed 2d 572, 579-580).

As to Question "6", Holt's only answer is to state falsely(brief pages 3, 19) that this question "is addressed solely to respondent Newfield". Petitioner's

argument on this question (petition pages 34-35) is addressed specifically to Holt's editor Wood. Holt's false evasion of it as addressed solely to Newfield is a clear indication that it has no answer to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted
IRWIN N. WILPON
COUNSEL FOR PETITIONER

November 10, 1977

APPENDIX 1

EXCERPT FROM PAGES 41-42 OF PETITIONERS BRIEF IN COURT OF APPEALS

As to the charge that "Rinaldi is very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing" (A65), Newfield admitted that he had no specific cases in mind (RA58) and on his motion for summary judgment, he offered none. Nor did he offer the facts in any case to support the charge "cruel or abusive to defendants" (A68). As to the charge "Every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia" (A69) he has offered nothing to show that the plaintiff has such a reputation, or much less, that any law enforcement agency is "aware" of it. As to the charge that "the Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" (A69), Newfield has not shown from the

facts in any case that the disposition was "suspicious" (Guam Federation of Teachers v. Ysrael 492 F. 2d 438,439.

APPENDIX 2

EXCERPT FROM PAGES 51-52 of PETITIONERS BRIEF IN COURT OF APPEALS

Wood admits the she read Newfield's original article of August 31,1972 with the large headline "Justice Gets a Fix." A reading of the article makes it clear that there is nothing in the article to support or justify the headline and its criminal connotation of bribery or improper influence. The minutes (A197, 205) in the Burton and Glover cases referred to in that article, which minutes Holt had read as part of its "reliance" on plaintiff's examination before trial in the prior action, further clearly demonstrated the falsity and maliciousness of the headline. Newfield in his examination in the prior action had testified "In none of these articles do I allege corruption or venality" (RA56). "I have no evidence of corruption" (RA57). Yet, Holt placed the same headline "Justice Gets a Fix" on the article in the book in large type (p.98) knowing that it was a false and maliciously defamatory headline.

In Sprouse v. Clay Communications Inc. (Sup.Ct. of App. W.Va. 1975) 211 S.E. 2d 674, 686, cert. den. 423 U.S.882 46L. ed 2d 107, reh den. 46 L. ed 2d 311, the Court held:

> "Where oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headlines may be considered separately with regard to whether a known falsehood was published."

"Defamatory headlines are actionable even though the matter following is not, unless they fairly indicate the substance of the matter to which they refer" (Lawyers Co-Op Publishing Co. v. West Publishing Co. 32 App. Div. 585, 590; Vocational Guidance Manuals Inc. v. United Newspaper Manuals, Inc., supra, 280 App. Div. 593,595 affd.305 N.Y. 380; Rathkopf v. Walker,190 Misc. 168; Campbell v. New York Post 245 N. Y. 320, 328; Abrey v. World Telegram 7 Misc. 2d 413, 415.